UNITED STATES REPORTS

VOLUME 442

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1978

MAY 24 THROUGH JUNE 20, 1979

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1981

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

350.973
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.

OFFICERS OF THE COURT

GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1978

GREENHOLTZ, CHAIRMAN, BOARD OF PAROLE OF NEBRASKA, ET AL. *v.* INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78-201. Argued January 17, 1979—Decided May 29, 1979

Under Nebraska statutes a prison inmate becomes eligible for discretionary parole when his minimum term, less good-time credits, has been served. Hearings are conducted in two stages to determine whether to grant or deny parole: initial review hearings and final parole hearings. Initial review hearings must be held at least once a year for every inmate. At the first stage, the Board of Parole examines the inmate's preconfinement and postconfinement record, and holds an informal hearing; the Board interviews the inmate and considers any letters or statements presented in support of a claim for release. If the Board determines that the inmate is not yet a good risk for release, it denies parole, stating why release was deferred. If the Board determines that the inmate is a likely candidate for release, a final hearing is scheduled, at which the inmate may present evidence, call witnesses, and be represented by counsel. A written statement of the reasons is given if parole is denied. One section of the statutes (§ 83-1,114 (1)) provides that the Board "shall" order an inmate's release unless it concludes that his release should be deferred for at least one of four specified reasons. Respondent inmates, who had been denied parole, brought a class action in Federal District Court,

which upheld their claim that the Board's procedures denied them procedural due process. The Court of Appeals, agreeing, held that the inmates had the same kind of constitutionally protected "conditional liberty" interest as was recognized in *Morrissey* v. *Brewer*, 408 U. S. 471, also found a statutorily defined, protectible interest in § 83–1,114 (1), and required, *inter alia*, that a formal hearing be held for every inmate eligible for parole and that every adverse parole decision include a statement of the evidence relied upon by the Board.

Held:

1. A reasonable entitlement to due process is not created merely because a State provides for the *possibility* of parole, such possibility providing no more than a mere hope that the benefit will be obtained. Parole *revocation*, for which certain due process standards must be met, *Morrissey* v. *Brewer*, *supra*, entails deprivation of a liberty one has and is a decision involving initially a wholly retrospective factual question as to whether the parolee violated his parole. Parole *release* involves denial of a liberty desired by inmates and that decision depends on an amalgam of elements, some factual but many purely subjective evaluations by the Board. Pp. 9–11.

2. While the language and structure of § 83–1,114 (1) provides a mechanism for parole that is entitled to some constitutional protection, the Nebraska procedure provides all the process due with respect to the discretionary parole decision. Pp. 11–16.

(a) The formal hearing required by the Court of Appeals would provide at best a negligible decrease in the risk of error. Since the Board of Parole's decision at its initial review hearing is one that must be made largely on the basis of the inmate's file, this procedure adequately safeguards against serious risks of error and thus satisfies due process. Pp. 14–15.

(b) Nothing in due process concepts requires the Board to specify the particular "evidence" in the inmate's file or at his interview on which it rests its discretionary determination to deny release. The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords all the process that is due in these circumstances, nothing more being required by the Constitution. Pp. 15–16.

576 F. 2d 1274, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 18. MARSHALL,

J., filed an opinion dissenting in part, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 22.

Ralph H. Gillan, Assistant Attorney General of Nebraska, argued the cause for petitioners. With him on the brief was *Paul L. Douglas*, Attorney General.

Brian K. Ridenour argued the cause and filed a brief for respondents.

William Alsup argued the cause for the United States as *amicus curiae*. On the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Easterbrook*, and *William G. Otis*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause of the Fourteenth Amendment applies to discretionary parole-release determinations made by the Nebraska Board of Parole, and, if so, whether the procedures the Board currently provides meet constitutional requirements.

I

Inmates of the Nebraska Penal and Correctional Complex brought a class action under 42 U. S. C. § 1983 claiming that they had been unconstitutionally denied parole by the Board

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*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, and *John T. Murphy* and *Karl S. Mayer*, Deputy Attorneys General, for the State of California; and by *Larry Derryberry*, Attorney General, and *John F. Fischer II*, Assistant Attorney General, for the State of Oklahoma.

Alvin J. Bronstein and *Dean Hill Rivkin* filed a brief for the National Prison Project of the American Civil Liberties Union Foundation as *amicus curiae* urging affirmance.

Pierce O'Donnell and *Robert L. Weinberg* filed a brief for the Jerome N. Frank Legal Services Organization et al. as *amici curiae*.

of Parole. The suit was filed against the individual members of the Board. One of the claims of the inmates was that the statutes and the Board's procedures denied them procedural due process.

The statutes provide for both mandatory and discretionary parole. Parole is automatic when an inmate has served his maximum term, less good-time credits. Neb. Rev. Stat. § 83–1,107 (1)(b) (1976). An inmate becomes eligible for discretionary parole when the minimum term, less good-time credits, has been served. § 83–1,110 (1). Only discretionary parole is involved in this case.

The procedures used by the Board to determine whether to grant or deny discretionary parole arise partly from statutory provisions and partly from the Board's practices. Two types of hearings are conducted: initial parole review hearings and final parole hearings. At least once each year initial review hearings must be held for every inmate, regardless of parole eligibility. § 83–192 (9).[1] At the initial review hearing, the Board examines the inmate's entire preconfinement and postconfinement record. Following that examination it provides an informal hearing; no evidence as such is introduced, but the Board interviews the inmate and considers any letters or statements that he wishes to present in support of a claim for release.

If the Board determines from its examination of the entire record and the personal interview that he is not yet a good risk for release, it denies parole, informs the inmate why release was deferred and makes recommendations designed to

[1] The statute defines the scope of the initial review hearing as follows:

"Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record, his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and his prospects for future parole . . . ." Neb. Rev. Stat. § 83–192 (9) (1976).

help correct any deficiencies observed. It also schedules another initial review hearing to take place within one year.

If the Board determines from the file and the initial review hearing that the inmate is a likely candidate for release, a final hearing is scheduled. The Board then notifies the inmate of the month in which the final hearing will be held; the exact day and time is posted on a bulletin board that is accessible to all inmates on the day of the hearing. At the final parole hearing, the inmate may present evidence, call witnesses and be represented by private counsel of his choice. It is not a traditional adversary hearing since the inmate is not permitted to hear adverse testimony or to cross-examine witnesses who present such evidence. However, a complete tape recording of the hearing is preserved. If parole is denied, the Board furnishes a written statement of the reasons for the denial within 30 days. § 83–1,111 (2).[2]

II

The District Court held that the procedures used by the Parole Board did not satisfy due process. It concluded that the inmate had the same kind of constitutionally protected "conditional liberty" interest, recognized by this Court in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), held that some of the procedures used by the Parole Board fell short of constitutional guarantees, and prescribed several specific requirements.

On appeal, the Court of Appeals for the Eighth Circuit agreed with the District Court that the inmate had a *Morrissey*-type, conditional liberty interest at stake and also found a

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[2] Apparently, over a 23-month period, there were eight cases with letters of denial that did not include a statement of reasons for the denial. A representative of the Board of Parole testified at trial that these were departures from standard practice. There is nothing to indicate that these inmates could not have received a statement if they had requested one or that a direct challenge to this departure from the statute would not have produced relief. See Neb. Rev. Stat. § 25–1901 *et seq.* (1975).

statutorily defined, protectible interest in Neb. Rev. Stat. § 83–1,114 (1976). The Court of Appeals, however, 576 F. 2d 1274, 1285, modified the procedures required by the District Court as follows:

> (a) When eligible for parole each inmate must receive a full formal hearing;
>
> (b) the inmate is to receive written notice of the precise time of the hearing reasonably in advance of the hearing, setting forth the factors which may be considered by the Board in reaching its decision;
>
> (c) subject only to security considerations, the inmate may appear in person before the Board and present documentary evidence in his own behalf. Except in unusual circumstances, however, the inmate has no right to call witnesses in his own behalf;
>
> (d) a record of the proceedings, capable of being reduced to writing, must be maintained; and
>
> (e) within a reasonable time after the hearing, the Board must submit a full explanation, in writing, of the facts relied upon and reasons for the Board's action denying parole.

The court's holding mandating the foregoing procedures for parole determinations conflicts with decisions of other Courts of Appeals, see, *e. g., Brown* v. *Lundgren,* 528 F. 2d 1050 (CA5), cert. denied, 429 U. S. 917 (1976); *Scarpa* v. *United States Board of Parole,* 477 F. 2d 278 (CA5) (en banc), vacated as moot, 414 U. S. 809 (1973); *Scott* v. *Kentucky Parole Board,* No. 74–1899 (CA6 Jan. 15, 1975), vacated and remanded to consider mootness, 429 U. S. 60 (1976). See also *Franklin* v. *Shields,* 569 F. 2d 784, 800 (CA4 1977), cert. denied, 435 U. S. 1003 (1978); *United States ex rel. Richerson* v. *Wolff,* 525 F. 2d 797 (CA7 1975), cert. denied, 425 U. S. 914 (1976). We granted certiorari to resolve the Circuit conflicts. 439 U. S. 817.

III

The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest.

> "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Board of Regents* v. *Roth*, 408 U. S. 564, 570–571 (1972).

This has meant that to obtain a protectible right

> "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*, at 577.

There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Meachum* v. *Fano*, 427 U. S. 215, 224, (1976).

Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations. See *Id.*, at 225; *Montanye* v. *Haymes*, 427 U. S. 236 (1976); *Moody* v. *Daggett*, 429 U. S. 78, 88 n. 9 (1976). This is especially true with respect to the sensitive choices presented by the administrative decision to grant parole release.

A state may, as Nebraska has, establish a parole system, but it has no duty to do so. Moreover, to insure that the

state-created parole system serves the public-interest purposes of rehabilitation and deterrence,[3] the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. It is thus not surprising that there is no prescribed or defined combination of facts which, if shown, would mandate release on parole. Indeed, the very institution of parole is still in an experimental stage. In parole releases, like its siblings probation release and institutional rehabilitation, few certainties exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.[4] This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice. The entire inquiry is, in a sense, an "equity" type judgment that cannot always be articulated in traditional findings.

IV

Respondents suggest two theories to support their view that they have a constitutionally protected interest in a parole determination which calls for the process mandated by the Court of Appeals. First, they claim that a reasonable entitlement is created whenever a state provides for the *possibility*

[3] These are the traditional justifications advanced to support the adoption of a system of parole. See generally A. von Hirsch & K. Hanrahan, Abolish Parole? 3 (1978); N. Morris, The Future of Imprisonment 47 (1974); J. Wilson, Thinking About Crime 171 (1975); D. Stanley, Prisoners Among Us 59, 76 (1976); Dawson, The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice, 1966 Wash. U. L. Q. 243, 249.

[4] See Stanley, *supra* n. 3, at 50–55; Dawson, *supra* n. 3, at 287–288.

of parole. Alternatively, they claim that the language in Nebraska's statute, Neb. Rev. Stat. § 83–1,114 (1) (1976), creates a legitimate expectation of parole, invoking due process protections.

A

In support of their first theory, respondents rely heavily on *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), where we held that a parole-revocation determination must meet certain due process standards. See also *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). They argue that the ultimate interest at stake both in a parole-revocation decision and in a parole determination is conditional liberty and that since the underlying interest is the same the two situations should be accorded the same constitutional protection.

The fallacy in respondents' position is that parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires. The parolees in *Morrissey* (and probationers in *Gagnon*) were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form the other enduring attachments of normal life." 408 U. S., at 482. The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison.

A second important difference between discretionary parole *release* from confinement and *termination* of parole lies in the nature of the decision that must be made in each case. As we recognized in *Morrissey*, the parole-revocation determination actually requires two decisions: whether the parolee in fact acted in violation of one or more conditions of parole and whether the parolee should be recommitted either for his or society's benefit. *Id.*, at 479–480. "The first step in a revocation decision thus involves a wholly retrospective factual question." *Id.*, at 479.

The parole-release decision, however, is more subtle and

depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual. The parole determination, like a prisoner-transfer decision, may be made

> "for a variety of reasons and often involve[s] no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate." *Meachum* v. *Fano*, 427 U. S., at 225.

The decision turns on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 813 (1961).

The differences between an initial grant of parole and the revocation of the conditional liberty of the parolee are well recognized. In *United States ex rel. Bey* v. *Connecticut Board of Parole*, 443 F. 2d 1079, 1086 (1971), the Second Circuit took note of this critical distinction:

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

Judge Henry Friendly cogently noted that "there is a human difference between losing what one has and not getting what one wants." Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296 (1975). See also *Brown* v. *Lundgren*, 528 F. 2d, at 1053; *Scarpa* v. *United States Board of Parole*, 477 F. 2d, at 282; *Franklin* v. *Shields*, 569 F. 2d, at 799 (Field, J., dissenting); *United States ex rel. Johnson* v. *Chairman, New*

York State Board of Parole, 500 F. 2d 925, 936 (CA2 1974) (Hay, J., dissenting).

That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. *Board of Regents* v. *Roth,* 408 U. S., at 577. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process. *Meachum* v. *Fano,* 427 U. S., at 225; *Montanye* v. *Haymes, supra.*

B

Respondents' second argument is that the Nebraska statutory language itself creates a protectible expectation of parole. They rely on the section which provides in part:

> "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> "(a) There is a substantial risk that he will not conform to the conditions of parole;
>
> "(b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> "(c) His release would have a substantially adverse effect on institutional discipline; or
>
> "(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." Neb. Rev. Stat. § 83–1,114 (1) (1976).[5]

Respondents emphasize that the structure of the provision together with the use of the word "shall" binds the Board of

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[5] The statute also provides a list of 14 explicit factors and one catchall factor that the Board is obligated to consider in reaching a decision. Neb. Rev. Stat. §§ 83–1,114 (2)(a)–(n) (1976). See Appendix to this opinion.

Parole to release an inmate unless any one of the four specifically designated reasons are found. In their view, the statute creates a presumption that parole release will be granted, and that this in turn creates a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists.

It is argued that the Nebraska parole-determination provision is similar to the Nebraska statute involved in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), that granted good-time credits to inmates. There we held that due process protected the inmates from the arbitrary loss of the statutory right to credits because they were provided subject only to good behavior. We held that the statute created a liberty interest protected by due process guarantees. The Board argues in response that a presumption would be created only if the statutory conditions for deferral were essentially factual, as in *Wolff* and *Morrissey*, rather than predictive.

Since respondents elected to litigate their due process claim in federal court, we are denied the benefit of the Nebraska courts' interpretation of the scope of the interest, if any, the statute was intended to afford to inmates. See *Bishop* v. *Wood*, 426 U. S. 341, 345 (1976). We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis. We therefore turn to an examination of the statutory procedures to determine whether they provide the process that is due in these circumstances.

It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S., at 481; *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162–

163 (1951) (Frankfurter, J., concurring). The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

Here, as we noted previously, the Parole Board's decision as defined by Nebraska's statute is necessarily subjective in part and predictive in part. Like most parole statutes, it vests very broad discretion in the Board. No ideal, error-free way to make parole-release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior. Our system of federalism encourages this state experimentation. If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole. Cf. Me. Rev. Stat. Ann., Tit. 34, §§ 1671–1679 (1964), repealed, 1975 Me. Acts, ch. 499, § 71 (repealing the State's parole system).

It is important that we not overlook the ultimate purpose of parole which is a component of the long-range objective of rehabilitation. The fact that anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago need not lead states to abandon hopes for those objectives; states may adopt a balanced approach in making parole determinations, as in all problems of administering the correctional systems. The objective of rehabilitating convicted persons to be useful, law-abiding members of society can remain a goal no matter how disappointing the progress. But it will not contribute to these desirable

objectives to invite or encourage a continuing state of adversary relations between society and the inmate.

Procedures designed to elicit specific facts, such as those required in *Morrissey*, *Gagnon*, and *Wolff*, are not necessarily appropriate to a Nebraska parole determination. See *Board of Curators, Univ. of Missouri* v. *Horowitz*, 435 U. S. 78, 90 (1978); *Cafeteria & Restaurant Workers* v. *McElroy*, *supra*, at 895. Merely because a statutory expectation exists cannot mean that in addition to the full panoply of due process required to convict and confine there must also be repeated, adversary hearings in order to continue the confinement. However, since the Nebraska Parole Board provides at least one and often two hearings every year to each eligible inmate, we need only consider whether the additional procedures mandated by the Court of Appeals are required under the standards set out in *Mathews* v. *Eldridge*, *supra*, at 335, and *Morrissey* v. *Brewer*, *supra*, at 481.

Two procedures mandated by the Court of Appeals are particularly challenged by the Board: [6] the requirement that a formal hearing be held for every inmate, and the requirement that every adverse parole decision include a statement of the evidence relied upon by the Board.

The requirement of a hearing as prescribed by the Court of Appeals in all cases would provide at best a negligible decrease in the risk of error. See D. Stanley, Prisoners Among Us 43 (1976). When the Board defers parole after the initial review

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[6] The Board also objects to the Court of Appeals' order that it provide written notice reasonably in advance of the hearing together with a list of factors that might be considered. At present the Board informs the inmate in advance of the month during which the hearing will be held, thereby allowing time to secure letters or statements; on the day of the hearing it posts notice of the exact time. There is no claim that either the timing of the notice or its substance seriously prejudices the inmate's ability to prepare adequately for the hearing. The present notice is constitutionally adequate.

hearing, it does so because examination of the inmate's file and the personal interview satisfies it that the inmate is not yet ready for conditional release. The parole determination therefore must include consideration of what the entire record shows up to the time of the sentence, including the gravity of the offense in the particular case. The behavior record of an inmate during confinement is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release. At the Board's initial interview hearing, the inmate is permitted to appear before the Board and present letters and statements on his own behalf. He is thereby provided with an effective opportunity first, to insure that the records before the Board are in fact the records relating to his case; and second, to present any special considerations demonstrating why he is an appropriate candidate for parole. Since the decision is one that must be made largely on the basis of the inmate's files, this procedure adequately safeguards against serious risks of error and thus satisfies due process.[7] Cf. *Richardson* v. *Perales*, 402 U. S. 389, 408 (1971).

Next, we find nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular "evidence" in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release. The Board communicates the reason for its denial as a guide to the inmate for his future behavior. See *Franklin* v. *Shields*, 569 F. 2d, at 800 (en banc). To require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate the Board's

[7] The only other possible risk of error is that relevant adverse factual information in the inmate's file is wholly inaccurate. But the Board has discretion to make available to the inmate any information "[w]henever the board determines that it will facilitate the parole hearing." Neb. Rev. Stat. § 83–1,112 (1) (1976). Apparently the inmates are satisfied with the way this provision is administered since there is no issue before us regarding access to their files.

parole-release determination with a guilt determination. The Nebraska statute contemplates, and experience has shown, that the parole-release decision is, as we noted earlier, essentially an experienced prediction based on a host of variables. See Dawson, The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice, 1966 Wash. U. L. Q. 243, 299–300. The Board's decision is much like a sentencing judge's choice—provided by many states—to grant or deny probation following a judgment of guilt, a choice never thought to require more than what Nebraska now provides for the parole-release determination. Cf. *Dorszynski* v. *United States*, 418 U. S. 424 (1974). The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more.

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.[8]

So ordered.

APPENDIX TO OPINION OF THE COURT

The statutory factors that the Board is required to take into account in deciding whether or not to grant parole are the following:

(a) The offender's personality, including his maturity, sta-

[8] The Court of Appeals in its order required the Board to permit all inmates to appear and present documentary support for parole. Since both of these requirements were being complied with prior to this litigation, the Board did not seek review of those parts of the court's order and the validity of those requirements is not before us. The Court of Appeals also held that due process did not provide a right to cross-examine adverse witnesses or a right to present favorable witnesses. The practice of taping the hearings also was declared adequate. Those issues are not before us and we express no opinion on them.

bility, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup, including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(*l*) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant. Neb. Rev. Stat. § 83–1,114 (2) (1976).

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the Court that the respondents have a right under the Fourteenth Amendment to due process in the consideration of their release on parole. I do not believe, however, that the applicability of the Due Process Clause to parole-release determinations depends upon the particular wording of the statute governing the deliberations of the parole board, or that the limited notice of the final hearing currently given by the State is consistent with the requirements of due process.

I

A substantial liberty from legal restraint is at stake when the State makes decisions regarding parole or probation. Although still subject to limitations not imposed on citizens never convicted of a crime, the parolee enjoys a liberty incomparably greater than whatever minimal freedom of action he may have retained within prison walls, a fact that the Court recognized in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972).

> "The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *Id.*, at 482.

Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action. *Ingraham* v. *Wright*, 430 U. S. 651, 673–674 (1977); *Board of Regents* v. *Roth*, 408

U. S. 564, 572 (1972). Because this fundamental liberty "is valuable" and "its termination inflicts a 'grievous loss' on the parolee," the Court concluded in *Morrissey* that the decision to revoke parole must be made in conformity with due process standards. 408 U. S., at 482. Similarly in *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), we held that a probationer must be accorded due process when a decision is to be made about the continuation of his probation. And the decision to rescind a prisoner's "good-time credits," which directly determine the time at which he will be eligible for parole, also must be reached in compliance with due process requirements. *Wolff* v. *McDonnell*, 418 U. S. 539 (1974).

In principle, it seems to me that the Due Process Clause is no less applicable to the parole-release determination than to the decisions by state agencies at issue in the foregoing cases. Nothing in the Constitution requires a State to provide for probation or parole. But when a State adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law whenever those standards are met. This is so whether the governing statute states, as here, that parole "shall" be granted unless certain conditions exist, or provides some other standard for making the parole decision. Contrary to the Court's conclusion, *ante*, at 9–11, I am convinced that the presence of a parole system is sufficient to create a liberty interest, protected by the Constitution, in the parole-release decision.

The Court today, however, concludes that parole release and parole revocation "are quite different," because " 'there is a . . . difference between losing what one has and not getting what one wants,' " *ante*, at 9, 10. I am unpersuaded that this difference, if indeed it exists at all, is as significant as the Court implies. Release on parole marks the first time when the severe restrictions imposed on a prisoner's liberty by the prison regimen may be lifted, and his behavior in prison

often is molded by his hope and expectation of securing parole at the earliest time permitted by law. Thus, the parole-release determination may be as important to the prisoner as some later, and generally unanticipated, parole-revocation decision. Moreover, whatever difference there may be in the subjective reactions of prisoners and parolees to release and revocation determinations is not dispositive. From the day that he is sentenced in a State with a parole system, a prisoner justifiably expects release on parole when he meets the standards of eligibility applicable within that system. This is true even if denial of release will be a less severe disappointment than revocation of parole once granted.

I am unconvinced also by the Court's suggestion that the prisoner has due process rights in the context of parole revocation but not parole release because of the different "nature of the decision that must be made in each case." *Ante,* at 9. It is true that the parole-revocation determination involves two inquiries: the parole board must ascertain the facts related to the prisoner's behavior on parole, and must then make a judgment whether or not he should be returned to prison. But unless the parole board makes parole-release determinations in some arbitrary or random fashion, these subjective evaluations about future success on parole also must be based on retrospective factual findings. See *ante,* at 14–15. In addition, it seems to me that even if there were any systematic difference between the factual inquiries relevant to release and revocation determinations, this difference, under currently existing parole systems, would be too slight to bear on the existence of a liberty interest protected by the Due Process Clause. It might be relevant, of course, in determining the process to be accorded in each setting.

II

The Court correctly concludes, in my view, that the Court of Appeals erred in ordering that a formal hearing be held for every inmate and that every adverse parole decision in-

clude a statement of the evidence relied upon by the Board. *Ante,* at 14–16. The type of hearing afforded by Nebraska comports generously with the requirements of due process, and the report of the Board's decision also seems adequate. Accordingly, I agree that the judgment of the Court of Appeals must be reversed and the case remanded.

I do not agree, however, with the Court's decision that the present notice afforded to prisoners scheduled for final hearings (as opposed to initial review hearings) is constitutionally adequate. *Ante,* at 14 n. 6. Under present procedures, a prisoner is told in advance the month during which his final hearing will be held, but is not notified of the exact date of the hearing until the morning of the day that it will occur. Thus, although a prisoner is allowed to "present evidence, call witnesses and be represented by private counsel," *ante,* at 5, at the final hearing, his ability to do so necessarily is reduced or nullified completely by the State's refusal to give notice of the hearing more than a few hours in advance.

The Court's opinion asserts that "[t]here is no claim that . . . the timing of the notice . . . seriously prejudices the inmate's ability to prepare adequately for the hearing." *Ante,* at 14 n. 6. But the original complaint in this case cited as an alleged denial of due process the State's failure to "inform the [respondents] in advance of the date and time of their hearings before the Board of Parole." The District Court ordered the petitioners to give prisoners notice of hearings at least 72 hours in advance of the hearings, and the Court of Appeals affirmed that order. The respondents have supported that judgment in this Court by arguing that the courts below correctly determined that the current notice procedure undermines the prisoner's ability to present his case adequately at the final review hearing. Brief for Respondents 65. This conclusion accords with common sense, despite the petitioners' comment that prisoners "are seldom gone on vacation or have conflicting appointments on the day their parole hear-

ing is set." Brief for Petitioners 30. It also imposes only a minimal burden on the State. I therefore agree with the decision of the courts below to require the State to give at least three days' notice of final hearings, and I would not require the Court of Appeals to modify this portion of its judgment on remand.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting in part.

My disagreement with the Court's opinion extends to both its analysis of respondents' liberty interest and its delineation of the procedures constitutionally required in parole release proceedings. Although it ultimately holds that the Nebraska statutes create a constitutionally protected "expectation of parole," the Court nonetheless rejects the argument that criminal offenders have such an interest whenever a State establishes the possibility of parole. This gratuitous commentary reflects a misapplication of our prior decisions and an unduly narrow view of the liberty protected by the Fourteenth Amendment. Since the Court chooses to address the issue, I must register my opinion that *all* prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system.

The Court further determines that the Nebraska Board of Parole already provides all the process that is constitutionally due. In my view, the Court departs from the analysis adopted in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), and *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), and disregards considerations that militate for greater procedural protection. To supplement existing procedures, I would require that the Parole Board give each inmate reasonable notice of hearing dates and the factors to be considered, as well as a written statement of reasons and the essential facts underlying adverse decisions.

I

A

It is self-evident that all individuals possess a liberty interest in being free from physical restraint. Upon conviction for a crime, of course, an individual may be deprived of this liberty to the extent authorized by penal statutes.[1] But when a State enacts a parole system, and creates the possibility of release from incarceration upon satisfaction of certain conditions, it necessarily qualifies that initial deprivation. In my judgment, it is the existence of this system which allows prison inmates to retain their protected interest in securing freedoms available outside prison.[2] Because parole release proceedings clearly implicate this retained liberty interest, the Fourteenth Amendment requires that due process be observed, irrespective of the specific provisions in the applicable parole statute.

This Court's prior decisions fully support the conclusion that criminal offenders have a liberty interest in securing parole release. In *Morrissey* v. *Brewer, supra,* the Court held that all persons released on parole possess such an interest in remaining free from incarceration. Writing for the Court, MR. CHIEF JUSTICE BURGER stated that the appli-

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[1] A criminal conviction cannot, however, terminate all liberty interests. *Wolff* v. *McDonnell,* 418 U. S. 539, 555–556 (1974); see, *e. g., Procunier* v. *Navarette,* 434 U. S. 555 (1978); *Bounds* v. *Smith,* 430 U. S. 817 (1977); *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974); *Cruz* v. *Beto,* 405 U. S. 319 (1972); *Wilwording* v. *Swenson,* 404 U. S. 249 (1971); *Cooper* v. *Pate,* 378 U. S. 546 (1964); *Ex parte Hull,* 312 U. S. 546 (1941); *Weems* v. *United States,* 217 U. S. 349 (1910). See also *Carmona* v. *Ward,* 439 U. S. 1091 (1979) (MARSHALL, J., dissenting).

[2] See *Bell* v. *Wolfish,* 441 U. S. 520, 568–571 (1979) (MARSHALL, J., dissenting); *id.,* at 580–584 (STEVENS, J., dissenting); *Leis* v. *Flynt,* 439 U. S. 438, 448–453 (1979) (STEVENS, J., dissenting); *Meachum* v. *Fano,* 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting); cf. *Bell* v. *Wolfish, supra,* at 535–536, 545. See generally *Smith* v. *Organization of Foster Families,* 431 U. S. 816, 842–847 (1977).

cability of due process protections turns "on the extent to which an individual will be 'condemned to suffer grievous loss,'" citing *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and on the "nature of the interest." 408 U. S., at 481. In assessing the gravity and nature of the loss caused by parole revocation, *Morrissey* relied on the general proposition that parole release enables an individual "to do a wide range of things open to persons who have never been convicted of any crime." *Id.*, at 482.[3] Following *Morrissey*, *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), held that individuals on probation also retain a liberty interest which cannot be terminated without due process of law. Nowhere in either opinion did the Court even intimate that the weight or nature of the criminal offender's interest in maintaining his parole release or probation depends upon the specific terms of any statute, for in both cases the Court disregarded the applicable statutory language.[4] Rather, this liberty interest derived solely from the

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[3] Because parolees' enjoyment of these freedoms was subject to a number of restrictions, the Court characterized their liberty interest as "conditional." See 408 U. S., at 480. The risk that violation of those conditions could lead to termination of parole status, however, did not diminish the significance of the parolees' interest, since the Due Process Clause anticipates that most liberty interests may be abrogated under proper circumstances. So, too, here, respondents' interest does not forfeit constitutional protection simply because their freedom would also be subject to conditions or because of the possibility that the Nebraska Parole Board will deny release after providing due process of law.

[4] The state law in *Morrissey*, quoted only in the dissenting opinion, provided that "'[a]ll paroled prisoners . . . shall be subject, at any time, to be taken into custody and returned to the institution . . . .'" 408 U. S., at 493 n. 2 (Douglas, J., dissenting in part). The statute specified no other criteria for parole revocation. Thus, had the Court relied solely on particular statutory language, it could not have held that parolees possess a constitutionally protected interest in continuing their status. In *Scarpelli*, the Court completely ignored the pertinent statutory language. See 411 U. S., at 781–782.

existence of a system that permitted criminal offenders to serve their sentences on probation or parole.

Wolff v. *McDonnell*, 418 U. S. 539 (1974), adopted a similar approach. There, the Court concluded that abrogation of a prisoner's good-time credits implicates his interest in subsequently obtaining release from incarceration. Although the Court recognized that Nebraska was not constitutionally obligated to establish a credit system, by creating "a right to a shortened prison sentence through the accumulation of credits for good behavior," *id.*, at 557, the State had allowed inmates to retain a liberty interest that could be terminated only for "serious misbehavior." This liberty interest derived from the existence of a credit system, not from the specific language of the implementing statute, see *id.*, at 555–558, as decisions applying *Wolff* have consistently recognized.[5]

B

A criminal offender's interest in securing release on parole is therefore directly comparable to the liberty interests we

[5] Cf. *Baxter* v. *Palmigiano*, 425 U. S. 308, 323–324 (1976). Lower courts have understood *Wolff* to require due process safeguards whenever good-time credits are revoked, and have not focused on the language of various statutory provisions. See, *e. g.*, *Franklin* v. *Shields*, 569 F. 2d 784, 788–790, 800–801 (CA4) (en banc), cert. denied, 435 U. S. 1003 (1978); *United States ex rel. Larkins* v. *Oswald*, 510 F. 2d 583 (CA2 1975); *Gomes* v. *Travisono*, 510 F. 2d 537 (CA1 1974); *Willis* v. *Ciccone*, 506 F. 2d 1011, 1017 (CA8 1974); *Workman* v. *Mitchell*, 502 F. 2d 1201 (CA9 1974). See also *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 712–713 (CA7 1973) (Stevens, J.), cert. denied *sub nom. Gutierrez* v. *Department of Public Safety of Ill.*, 414 U. S. 1146 (1974).

Meachum v. *Fano*, 427 U. S. 215 (1976), signals no departure from the basic principles recognized in *Morrissey*, *Gagnon*, and *Wolff*. While the majority in *Meachum* concluded that the prisoners did not have a protected liberty interest in avoiding transfers between penal institutions, the Court's opinion rested on the absence of any limitation on such transfers rather than on particular statutory language. 427 U. S., at 225–228. See *Tracy* v. *Salamack*, 572 F. 2d 393, 395 n. 9 (CA2 1978); *Four Certain Unnamed Inmates* v. *Hall*, 550 F. 2d 1291, 1292 (CA1 1977).

recognized in *Morrissey, Scarpelli,* and *Wolff.* However, because the Court discerns two distinctions between "parole *release* and parole *revocation*," *ante,* at 9, it refuses to follow these cases here. In my view, the proffered distinctions do not support this departure from precedent.

First, the Court finds a difference of constitutional dimension between a deprivation of liberty one has and a denial of liberty one desires. *Ibid.* While there is obviously some difference, it is not one relevant to the established constitutional inquiry. Whether an individual currently enjoys a particular freedom has no bearing on whether he possesses a protected interest in securing and maintaining that liberty. The Court acknowledged as much in *Wolff* v. *McDonnell, supra,* when it held that the loss of good-time credits implicates a liberty interest even though the forfeiture only deprived the prisoner of freedom he expected to obtain sometime hence. See *Drayton* v. *McCall,* 584 F. 2d 1208, 1219 (CA2 1978). And in other contexts as well, this Court has repeatedly concluded that the Due Process Clause protects liberty interests that individuals do not currently enjoy.[6]

The Court's distinction is equally unrelated to the nature

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[6] See, *e. g., Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963); *Speiser* v. *Randall,* 357 U. S. 513 (1958); *Konigsberg* v. *State Bar,* 353 U. S. 252 (1957); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957); *Simmons* v. *United States,* 348 U. S. 397 (1955); *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117 (1926).

The Second Circuit has characterized the attempt to differentiate between a liberty interest currently enjoyed but subject to termination, and an interest that can be enjoyed in the future following an administrative proceeding, as actually "nothing more than a reincarnation of the right-privilege dichotomy in a not-too-deceptive disguise." *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole,* 500 F. 2d 925, 927–928, n. 2, vacated as moot *sub nom. Regan* v. *Johnson,* 419 U. S. 1015 (1974), construing *United States ex rel. Bey* v. *Connecticut Board of Parole,* 443 F. 2d 1079, 1086 (CA2 1971), which the Court quotes *ante,* at 10; see Comment, The Parole System, 120 U. Pa. L. Rev. 282, 363 (1971).

or gravity of the interest affected in parole release proceedings. The nature of a criminal offender's interest depends on the range of freedoms available by virtue of the parole system's existence. On that basis, *Morrissey* afforded constitutional recognition to a parolee's interest because his freedom on parole includes "many of the core values of unqualified liberty." 408 U. S., at 482. This proposition is true regardless of whether the inmate is presently on parole or seeking parole release. As the Court of Appeals for the Second Circuit has recognized, "[w]hether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole,* 500 F. 2d 925, 928, vacated as moot *sub nom. Regan* v. *Johnson,* 419 U. S. 1015 (1974).

The Court's second justification for distinguishing between parole release and parole revocation is based on the "nature of the decision that must be made in each case." *Ante,* at 9. The majority apparently believes that the interest affected by parole release proceedings is somehow diminished if the administrative decision may turn on "subjective evaluations." Yet the Court nowhere explains why the *nature of the decisional process* has even the slightest bearing in assessing the *nature of the interest* that this process may terminate.[7] Indeed, the Court's reasoning here is flatly inconsistent with its subsequent holding that respondents do have a protected liberty interest under Nebraska's parole statutes, which require a decision that is "subjective in part and predictive in part." *Ante,* at 13. For despite the Parole Board's argument that such an interest exists "only if the statutory con-

[7] Government decisionmakers do not gain a "license for arbitrary procedure" when legislators confer a "substantial degree of discretion" regarding the assessment of subjective considerations. *Kent* v. *United States,* 383 U. S. 541, 553 (1966); see *Thorpe* v. *Housing Authority of City of Durham,* 386 U. S. 670, 678 (1967) (Douglas, J., concurring).

ditions for [denying parole are] essentially factual, as in *Wolff* and *Morrissey*, rather than predictive," *ante*, at 12, the Court nonetheless concludes that respondents' interest is sufficient to merit constitutional protection.

But even assuming the subjective nature of the decision-making process were relevant to due process analysis in general, this consideration does not adequately distinguish the processes of granting and revoking parole. See *Morrissey* v. *Brewer*, 408 U. S., at 477–480; *Gagnon* v. *Scarpelli*, 411 U. S., at 781–782. Contrary to the Court's assertion that the decision to revoke parole is predominantly a " 'retrospective factual question,' " *ante*, at 9, *Morrissey* recognized that only the first step in the revocation decision can be so characterized. And once it is

> "determined that the parolee did violate the conditions [of parole, a] second question arise[s]: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. . . . [T]his second step, deciding what to do about the violation once it is identified, *is not purely factual but also predictive and discretionary.*" 408 U. S., at 479–480 (emphasis added).

Morrissey thus makes clear that the parole revocation decision includes a decisive subjective component. Moreover, to the extent parole release proceedings hinge on predictive determinations, those assessments are necessarily predicated on findings of fact.[8] Accordingly, the presence of subjective

[8] See *Franklin* v. *Shields*, 569 F. 2d, at 791; Dawson, The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice, 1966 Wash. U. L. Q. 243, 248–285; cf. *Morrissey* v. *Brewer*, 408 U. S., at

considerations is a completely untenable basis for distinguishing the interests at stake here from the liberty interest recognized in *Morrissey*.

C

The Court also concludes that the existence of a parole system by itself creates "no more than a mere hope that the benefit will be obtained," *ante*, at 11, and thus does not give rise to a liberty interest. This conclusion appears somewhat gratuitous, given the Court's ultimate holding that the Nebraska statutes do generate a "legitimate expectation of [parole] release" which is protected by the Due Process Clause. *Ante*, at 12. Moreover, it is unclear what purpose can be served by the Court's endeavor to depreciate the expectations arising solely from the existence of a parole system. The parole statutes in many jurisdictions embody the same standards used in the Model Penal Code, upon which both the Nebraska and federal provisions are patterned, and the Court's analysis of the Nebraska statutes would therefore suggest that the other statutes must also create protectible expectations of release.[9]

479–480. The Nebraska statutes, in particular, demonstrate the factual nature of the parole release inquiry. One provision, quoted *ante*, at 16–18, enumerates factual considerations such as the inmate's intelligence, family status, and employment history, which bear upon the four predictive determinations underlying the ultimate parole decision. See *ante*, at 11.

[9] The parole statutes of 47 States establish particular standards, criteria, or factors to be applied in parole release determinations. A list of these statutes is set out in the Brief for Jerome N. Frank Legal Services Organization et al. as *Amici Curiae* 30–31, 23a–26a. These criteria presumably will be a significant source of inmates' "legitimate expectations" regarding the availability of parole. Expectations would also be shaped by the role that parole actually assumes in a jurisdiction's penological system, see *infra*, at 30–31. It is in these respects that most parole statutes are similar. While there are some differences in statutory language among jurisdictions, it is unrealistic to believe that variations such as the use of "may" rather than "shall," see *ante*, at 11–12, could negate the expectations derived from

Furthermore, in light of the role that parole has assumed in the sentencing process, I believe the Court misapplies its own test, see *ante*, at 11–12, by refusing to acknowledge that inmates have a legitimate expectation of release whenever the government establishes a parole system. As the Court observed in *Morrissey:*

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. . . . Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477.

Indeed, the available evidence belies the majority's broad assumptions concerning inmate expectations, at least with respect to the federal system, and there is no suggestion that experience in other jurisdictions is significantly different.[10]

Government statistics reveal that substantially less than one-third of all first-time federal offenders are held in prison until mandatory release.[11] In addition, 88% of the judges responding to a recent survey stated that they considered the availability of parole when imposing sentence, and 47% acknowledged their expectation that defendants would be re-

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experience with a parole system and the enumerated criteria for granting release.

[10] The New York State Parole Board, for example, granted parole in 75.4% of the cases it considered during 1972. See *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F. 2d, at 928. In addition, recent studies show that parole is the method of release for approximately 70% of all criminal offenders returned each year to the community. Uniform Parole Reports, Parole in the United States: 1976 and 1977, p. 55 (1978). In some States, the figure is as high as 97%. See Kastenmeier & Eglit, Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology, 22 Am. U. L. Rev. 477, 481–482 (1973).

[11] See Brief for United States in *United States* v. *Addonizio*, O. T. 1978, No. 78-156, p. 55 n. 47.

leased on parole after serving one-third of their sentences.[12] In accord with these views, the Administrative Conference of the United States has advised Congress that courts set maximum sentences anticipating "that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum term or anything approaching the maximum." [13] And in discussing the sentencing provisions of the proposed revision of the Federal Criminal Code, S. 1437, the Senate Judiciary Committee observed:

> "A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one third of the sentence." S. Rep. No. 95–605, p. 1169 (1977).

Thus, experience in the federal system has led both judges and legislators to expect that inmates will be paroled substantially before their sentences expire. Insofar as it is critical under the Court's due process analysis, this understanding would certainly justify a similar expectation on the part of the federal inmates. Hence, I believe it is unrealistic for this Court to speculate that the existence of a parole system provides prisoners "no more than a mere hope" of release. *Ante,* at 11.

II

A

I also cannot subscribe to the Court's assessment of the procedures necessary to safeguard respondents' liberty interest. Although the majority purports to rely on *Morrissey* v.

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[12] Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L. J. 810, 882 n. 361 (1975).

[13] Hearings on H. R. 1598 and Identical Bills before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 1st Sess., 163–164, 193 (1973) (testimony and statement of Antonin Scalia, Chairman of the Administrative Conference of the United States).

Brewer and the test enunciated in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), its application of these standards is fundamentally deficient in several respects.

To begin with, the Court focuses almost exclusively on the likelihood that a particular procedure will significantly reduce the risk of error in parole release proceedings. *Ante*, at 14–16. Yet *Mathews* advances *three* factors to be considered in determining the specific dictates of due process:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U. S., at 335.

By ignoring the other two factors set forth in *Mathews*, the Court skews the inquiry in favor of the Board. For example, the Court does not identify any justification for the Parole Board's refusal to provide inmates with specific advance notice of the hearing date or with a list of factors that may be considered. Nor does the Board demonstrate that it would be unduly burdensome to provide a brief summary of the evidence justifying the denial of parole. To be sure, these measures may cause some inconvenience, but "the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972); accord, *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973); *Bell* v. *Burson*, 402 U. S. 535, 540–541 (1971). Similarly lacking in the Court's analysis is any recognition of the private interest affected by the Board's action. Certainly the interest in being released from incarceration is of sufficient magnitude to have some bearing on the process due.[14]

[14] While the severity of a loss does not of itself establish that an interest deserves constitutional protection, this factor does weigh heavily in deter-

The second fundamental flaw in the Court's analysis is that it incorrectly evaluates the only factor actually discussed. The contribution that additional safeguards will make to reaching an accurate decision necessarily depends on the risk of error inherent in existing procedures. See *Mathews* v. *Eldridge, supra,* at 334–335, 343–347. Here, the Court finds supplemental procedures to be inappropriate because it assumes existing procedures adequately reduce the likelihood that an inmate's files will contain incorrect information which could lead to an erroneous decision. No support is cited for this assumption, and the record affords none. In fact, researchers and courts have discovered many substantial inaccuracies in inmate files, and evidence in the instant case revealed similar errors.[15] Both the District Court and the Court of Appeals

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mining the procedural safeguards mandated by the Fourteenth Amendment. See *Goss* v. *Lopez,* 419 U. S. 565, 575–576 (1975); *Board of Regents* v. *Roth,* 408 U. S. 564 (1972).

[15] In this case, for example, the form notifying one inmate that parole had been denied indicated that the Board believed he should enlist in a self-improvement program at the prison. But in fact, the inmate was already participating in all such programs available. Tr. 38–39. Such errors in parole files are not unusual. *E. g., Kohlman* v. *Norton,* 380 F. Supp. 1073 (Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard* v. *Mississippi State Probation and Parole Board,* 373 F. Supp. 699 (ND Miss. 1974), rev'd, 509 F. 2d 820 (CA5), cert. denied, 423 U. S. 998 (1975) (prisoner denied parole on basis of illegal disciplinary action); *In re Rodriguez,* 14 Cal. 3d 639, 537 P. 2d 384 (1975) (factually incorrect material in file led parole officers to believe that prisoner had violent tendencies and that his "family reject[ed] him"); *State* v. *Pohlabel,* 61 N. J. Super. 242, 160 A. 2d 647 (1960) (files erroneously showed that prisoner was under a life sentence in another jurisdiction); Hearings on H. R. 13118 et al. before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 2d Sess., pt. VII–A, p. 451 (1972) (testimony of Dr. Willard Gaylin: "I have seen black men listed as white and Harvard graduates listed with borderline IQ's"); S. Singer & D. Gottfredson, Development of a Data Base for Parole Decision-Making 2–5 (NCCD Research Center, Supp. Report 1, 1973) (information provided by FBI often lists same charge six or seven times without showing a final disposition).

found additional procedures necessary to decrease the margin of error in Nebraska's parole release proceedings. Particularly since the Nebraska statutes tie the parole decision to a number of highly specific factual inquiries, see *ante*, at 16–18, I see no basis in the record for rejecting the lower courts' conclusion.

Finally, apart from avoiding the risk of actual error, this Court has stressed the importance of adopting procedures that preserve the appearance of fairness and the confidence of inmates in the decisionmaking process. THE CHIEF JUSTICE recognized in *Morrissey* that "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness," 408 U. S., at 484 (citation omitted), a view shared by legislators, courts, the American Bar Association, and other commentators.[16] This consideration is equally significant whether liberty interests are extinguished in parole release or parole revocation proceedings. As Mr. Justice Frankfurter argued in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S., at 171–172 (concurring opinion):

> "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the

[16] See, *e. g.*, S. Rep. No. 94–369, p. 19 (1975) ("It is essential, then, that parole has both the fact and appearance of fairness to all. Nothing less is necessary for the maintenance of the integrity of our criminal justice institutions"); *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F. 2d, at 928; *Phillips* v. *Williams*, 583 P. 2d 488, 490 (Okla. 1978), cert. pending, No. 78–1282; ABA, Standards Relating to the Legal Status of Prisoners (Tent. Draft 1977), in 14 Am. Crim. L. Rev. 377, 598 (1977); K. Davis, Discretionary Justice: A Preliminary Inquiry 126–133 (1969); Official Report of the New York State Special Commission on Attica 97, 98 (Bantam ed. 1972).

> case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

In my judgment, the need to assure the appearance, as well as the existence, of fairness supports a requirement that the Parole Board advise inmates of the specific dates for their hearings, the criteria to be applied, and the reasons and essential facts underlying adverse decisions. For "'[o]ne can imagine nothing more cruel, inhuman, and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for release.'" K. Davis, Discretionary Justice: A Preliminary Inquiry 132 (1969).

B

Applying the analysis of *Morrissey* and *Mathews*, I believe substantially more procedural protection is necessary in parole release proceedings than the Court requires. The types of safeguards that should be addressed here, however, are limited by the posture of this case.[17] Thus, only three specific issues need be considered.

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[17] In accordance with the majority opinion, *ante*, at 16 n. 8, I do not address whether the Court of Appeals was correct in holding that the Nebraska Parole Board may not abandon the procedures it already provides. These safeguards include permitting inmates to appear and present documentary support at hearings, and providing a statement of reasons when parole is denied or deferred. Because the inmates failed to seek review of the Court of Appeals' decision, I also express no view on whether it correctly held that the Board's practice of allowing inmates to present witnesses and retain counsel for final parole hearings was not constitutionally compelled. Finally, it would be inappropriate to consider the suggestion advanced here for the first time that inmates should be allowed access to their files in order to correct factual inaccuracies. Cf. *ante*, at 15 n. 7.

Nevertheless, the range of protections currently afforded does affect whether additional procedures are constitutionally compelled. The specific dictates of due process, of course, depend on what a particular situation

While the question is close, I agree with the majority that a formal hearing is not always required when an inmate first becomes eligible for discretionary parole. *Ante*, at 14–15. The Parole Board conducts an initial parole review hearing once a year for every inmate, even before the inmate is eligible for release. Although the scope of this hearing is limited, inmates are allowed to appear and present letters or statements supporting their case. If the Board concludes that an eligible inmate is a good candidate for release, it schedules a final and substantially more formal hearing.

The Court of Appeals directed the Parole Board to conduct such a formal hearing as soon as an inmate becomes eligible for parole, even where the likelihood of a favorable decision is negligible, but the court required no hearing thereafter. 576 F. 2d 1274, 1285 (CA8 1978). From a practical standpoint, this relief offers no appreciable advantage to the inmates. If the Board would not have conducted a final hearing under current procedures, inmates gain little from a requirement that such a hearing be held, since the evidence almost certainly would be insufficient to justify granting release. And because the Court of Appeals required the Board to conduct only one hearing, inmates risk losing the right to a formal proceeding at the very point additional safeguards may have a beneficial impact. The inmates' interest in this modification of the Board's procedures is thus relatively slight.[18] Yet the burden

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demands. See *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). Nebraska's use of formal hearings when the possibility of granting parole is substantial and informal hearings in other cases, for example, combined with provision of a statement of reasons for adverse decisions, obviously reduces the need for supplemental procedures.

[18] Although a formal hearing at the point of initial eligibility would reduce the risk of error and enhance the appearance of fairness, providing a summary of essential evidence and reasons, see n. 25, *infra*, together with allowing inmates to appear at informal hearings, decreases the justification for requiring the Board to conduct formal hearings in every case. See n. 17, *supra*.

imposed on the Parole Board by the additional formal hearings would be substantial. Accordingly, I believe the Board's current practice of combining both formal and informal hearings is constitutionally sufficient.

However, a different conclusion is warranted with respect to the hearing notices given inmates. The Board currently informs inmates only that it will conduct an initial review or final parole hearing during a particular month within the next year. The notice does not specify the day or hour of the hearing. Instead, inmates must check a designated bulletin board each morning to see if their hearing is scheduled for that day. In addition, the Board refuses to advise inmates of the criteria relevant in parole release proceedings, despite a state statute expressly listing 14 factors the Board must consider and 4 permissible reasons for denying parole. See Neb. Rev. Stat. § 83–1,114 (1976), quoted *ante*, at 11, 16–18.

Finding these procedures insufficient, the District Court and the Court of Appeals ordered that each inmate receive written advance notice of the time set for his hearing, along with a list of factors the Board may consider. 576 F. 2d, at 1285.[19] Although the Board has proffered no justification for refusing to institute these procedures, *id.*, at 1283, the Court sets aside the relief ordered below on the ground that "[t]here is no claim that either the timing of the notice or its substance seriously prejudices the inmate's ability to prepare adequately for the hearing." *Ante*, at 14 n. 6. But respondents plainly have contended throughout this litigation that reasonable advance notice is necessary to enable them to organize their evidence, call the witnesses permitted by the Board, and notify private counsel allowed to participate in the

[19] The courts below found that 72 hours' advance notice ordinarily would enable prisoners to prepare for their appearances. 576 F. 2d, at 1283. The Court of Appeals further determined that the statutory criteria were sufficiently specific that the Board need only include a list of those criteria with the hearing notices or post such a list in public areas throughout the institution. *Ibid.*

hearing, see Brief for Respondents 65–66; Answer Brief for Appellee Inmates in No. 77–1889 (CA8), pp. 6, 8–9, 25, 28; Trial Brief for Inmates in Civ. 72–L–335 (Neb.), pp. 17–18; and the courts below obviously agreed. See 576 F. 2d, at 1283; Mem. Op. in Civ. 72–L–335 (Neb., Oct. 21, 1977), App. to Pet. for Cert. 25, 39, 45–47. Given the significant private interests at stake, and the importance of reasonable notice in preserving the appearance of fairness, I see no reason to depart here from this Court's longstanding recognition that adequate notice is a fundamental requirement of due process, *e. g., Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 13 (1978); *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314 (1950), a principle heretofore found equally applicable in the present context. *Wolff* v. *McDonnell*, 418 U. S., at 563–564; *Gagnon* v. *Scarpelli*, 411 U. S., at 786; *Morrissey* v. *Brewer*, 408 U. S., at 486–487, 489.

Finally, I would require the Board to provide a statement of the crucial evidence on which it relies in denying parole.[20] At present, the Parole Board merely uses a form letter noting the general reasons for its decision. In ordering the Board to

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[20] Every other Court of Appeals holding the Due Process Clause applicable to parole release proceedings has also concluded that the parole board must advise the inmates in writing of the reasons for denying parole. See *Franklin* v. *Shields*, 569 F. 2d, at 800–801 (en banc); *United States ex rel. Richerson* v. *Wolff*, 525 F. 2d 797 (CA7 1975), cert. denied, 425 U. S. 914 (1976); *Childs* v. *United States Board of Parole*, 167 U. S. App. D. C. 268, 511 F. 2d 1270 (1974); *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F. 2d 925 (CA2), vacated as moot, 419 U. S. 1015 (1974). The parties to *Franklin* v. *Shields* did not request that the Parole Board also be required to provide a summary of the essential facts, see 569 F. 2d, at 787, 797, and the Fourth Circuit did not address the issue. The Second Circuit in *Johnson* expressly held that the statement of reasons must be supplemented by a summary of the "essential facts upon which the Board's inferences are based." 500 F. 2d, at 934. *Richerson* and *Childs* also indicated that the notice of reasons should include a description of the crucial facts. See 525 F. 2d, at 804; 511 F. 2d, at 1281–1284, aff'g 371 F. Supp. 1246, 1247 (1973).

furnish as well a summary of the essential facts underlying the denial, the Court of Appeals made clear that " 'detailed findings of fact are not required.' " 576 F. 2d, at 1284. The majority here, however, believes even this relief to be unwarranted, because it might render parole proceedings more adversary and equate unfavorable decisions with a determination of guilt. *Ante*, at 15–16.

The Court nowhere explains how these particular considerations are relevant to the inquiry required by *Morrissey* and *Mathews*. Moreover, it is difficult to believe that subsequently disclosing the factual justification for a decision will render the proceeding more adversary, especially when the Board already provides a general statement of reasons.[21] And to the extent unfavorable parole decisions resemble a determination of guilt, the Board has no legitimate interest in concealing from an inmate the conduct or failings of which he purportedly is guilty.

While requiring a summation of the essential evidence might entail some administrative inconvenience, in neither *Morrissey* v. *Brewer*, *supra*, at 489; *Gagnon* v. *Scarpelli*, *supra*, at 786; nor *Wolff* v. *McDonnell*, *supra*, at 563, 564–565, did the Court find that this factor justified denying a written statement of the essential evidence and the reasons underlying a decision. It simply is not unduly

> "burdensome to give reasons when reasons exist. Whenever an application . . . is denied . . . there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action." *Board of Regents* v. *Roth*, 408 U. S. 564, 591 (1972) (MARSHALL, J., dissenting).

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[21] Contrary to its supposition here, in *Wolff* v. *McDonnell*, 418 U. S., at 565, the Court could perceive no "prospect of prison disruption that can flow from the requirement of these statements."

See *Mathews* v. *Eldridge*, 424 U. S., at 345–346; *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943). And an inability to provide any reasons suggests that the decision is, in fact, arbitrary.[22]

Moreover, considerations identified in *Morrissey* and *Mathews* militate in favor of requiring a statement of the essential evidence. Such a requirement would direct the Board's focus to the relevant statutory criteria and promote more careful consideration of the evidence. It would also enable inmates to detect and correct inaccuracies that could have a decisive impact.[23] And the obligation to justify a decision publicly would provide the assurance, critical to the appearance of fairness, that the Board's decision is not capricious. Finally, imposition of this obligation would afford inmates instruction on the measures needed to improve their prison behavior and prospects for parole, a consequence surely consistent with rehabilitative goals.[24] Balancing these con-

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[22] See Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 811–812, 839 (1969).

[23] The preprinted list of reasons for denying parole is unlikely to disclose these types of factual errors. Out of 375 inmates denied parole during a 6-month period, the only reason given 285 of them was: "Your continued correctional treatment, vocational, educational, or job assignment in the facility will substantially enhance your capacity to lead a law-abiding life when released at a later date." App. 40–42. Although the denial forms also include a list of six "[r]ecommendations for correcting deficiencies," such as "[e]xhibit some responsibility and maturity," the evidence at trial showed that all six items were checked on 370 of the 375 forms, regardless of the facts of the particular case. App. 42; Tr. 38–39, 45–46.

[24] See, *e. g.*, cases cited in n. 20, *supra*; *Candarini* v. *Attorney General of United States*, 369 F. Supp. 1132, 1137 (EDNY 1974); *Monks* v. *New Jersey State Parole Board*, 58 N. J. 238, 249, 277 A. 2d 193, 199 (1971); K. Davis, Discretionary Justice: A Preliminary Inquiry 126–133 (1969); M. Frankel, Criminal Sentences 40–41 (1972); Dawson, The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice, 1966 Wash. U. L. Q. 243, 302; Comment, 6 St. Mary's L. J. 478, 487 (1974).

siderations against the Board's minimal interest in avoiding this procedure, I am convinced that the Fourteenth Amendment requires the Parole Board to provide inmates a statement of the essential evidence as well as a meaningful explanation of the reasons for denying parole release.[25]

Because the Court's opinion both depreciates inmates' fundamental liberty interest in securing parole release and sanctions denial of the most rudimentary due process protection, I respectfully dissent.

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[25] This statement of reasons and the summary of essential evidence should be provided to all inmates actually eligible for parole, whether the adverse decision is rendered following an initial review or a final parole hearing.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ET AL. *v.* FOUST

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78–38. Argued February 26, 1979—Decided May 29, 1979

Respondent was discharged by his employer, the Union Pacific Railroad Co., for failing properly to request an extension of his medical leave of absence. Petitioner union filed a grievance on respondent's behalf two days after the time for submission had expired. The National Railroad Adjustment Board denied respondent's claim on the ground that the union had not complied with the filing deadline. Respondent then brought an unfair representation suit against the union. A jury found for respondent, awarding him actual and punitive damages. The Court of Appeals affirmed in most respects, but remanded the case for consideration of whether the punitive damages award was excessive.

Held: The Railway Labor Act does not permit an employee to recover punitive damages for a union's breach of its duty of fair representation in processing an employee's grievance against his employer for wrongful discharge. Pp. 46–52.

(a) Since Congress has not specified what remedies are available in unfair representation actions, this Court's function is to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace. Pp. 47–48.

(b) The fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights. To permit punitive damages, which, by definition, provide monetary relief in excess of actual loss, could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has struck in the unfair representation area. Additionally, the prospect of punitive damages could curtail the broad discretion afforded unions in handling grievances and thereby inhibit the proper functioning of the collective-bargaining system. Inflicting such risks on employees, whose welfare depends on the strength of their unions, is too great a price for whatever deterrent effect punitive damages may have. Pp. 48–52.

572 F. 2d 710, reversed in part.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, in which BURGER, C. J., and REHNQUIST and STEVENS, JJ., joined, *post*, p. 52.

Laurence J. Cohen argued the cause for petitioners. With him on the briefs were *William J. Hickey, Laurence Gold,* and *George Kaufmann.*

Terry W. Mackey argued the cause and filed a brief for respondent.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This action arises from the failure of petitioner union properly to process respondent's grievance alleging wrongful discharge by his employer. The question presented is whether the Railway Labor Act [1] permits an employee to recover punitive damages for such a breach of a union's duty of fair representation.

I

Respondent, a member of the International Brotherhood of Electrical Workers (IBEW), was injured in March 1970 while working for the Union Pacific Railroad Co. (Union Pacific). He received a medical leave of absence through December 22, 1970. The collective-bargaining agreement between the union and the company required that employees either request an extension before their leave expired or return to work as scheduled. Accordingly, respondent sought to renew his leave in late December. Correspondence between Union Pacific and respondent's attorney, however, revealed that the company had not received a doctor's statement supporting respondent's request. Notwithstanding Union Pacific's written assurance on January 25, 1971, that it would await arrival of this document before reviewing respondent's

[1] 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*

case, respondent was discharged on February 3 because, in the company's view, he had not properly requested an extension.

After respondent's attorney failed to persuade Union Pacific to reconsider its decision, he wrote the IBEW District Chairman, D. F. Jones, requesting that the union initiate grievance proceedings on respondent's behalf pursuant to Rule 21 of the collective-bargaining agreement.[2] The letter was dated March 26, and was received by Jones on March 27, 52 days after the dismissal. Although Jones was aware that Rule 21 required presentation of grievances "within 60 days from the date of the occurrence on which the claim . . . is based," see n. 2, *supra*, and that this deadline was imminent, he did not immediately prepare a grievance letter. Rather, he contacted the IBEW General Chairman, Leo Wisniski, who insisted that respondent personally request in writing the union's assistance. Wisniski drafted a letter stating that the union could not "handle" the claim until such an authorization was received. App. to Brief for Respondent 8a. Instead of telephoning respondent or sending the letter directly to him, Wisniski mailed the letter to Jones, who then signed and forwarded it to respondent on April 5, 61 days after the discharge. Without awaiting the requested written authorization, Jones filed respondent's claim with Union Pacific on April 6, two days after the time for submission had expired. The claim form had been prepared by Wisniski in Omaha, Neb., sent to Jones in Rawlins, Wyo., and then mailed by Jones to the railroad in Omaha.

Both Union Pacific and the National Railroad Adjustment Board denied respondent's claim on the ground that IBEW had not complied with the 60-day filing deadline. Respondent then brought this suit against the union and several of

[2] Rule 21 (a)(1) provides:

"All claims or grievances must be presented in writing by . . . or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

its officers.[3] He alleged that by filing the grievance out of time, the union had breached its duty of fair representation, which resulted in dismissal of his wrongful discharge claim. A jury found for respondent, awarding him $40,000 actual damages and $75,000 punitive damages, and the District Court accepted the jury's award. No. C 74–50B (Wyo., May 17, 1976).

The Court of Appeals affirmed the District Court's judgment in most respects, but remanded the case for consideration of whether the punitive damages award was excessive. 572 F. 2d 710 (CA10 1978).[4] It rejected the suggestion of the Court of Appeals for the Third Circuit that punitive damages are impermissible in unfair representation suits,[5] and declined to adopt the Eighth Circuit's standard, which allows punitive damages only when union officers display malice toward the employee.[6] Rather, following the Fourth Circuit, the Court of Appeals ruled that a punitive award is appropriate if a

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[3] Prior to initiating this action, respondent filed a separate suit against the railroad seeking recovery for work-related personal injuries and for the allegedly wrongful discharge. As part of a settlement of the personal injury action, respondent waived his wrongful discharge claim. App. 73.

[4] The court held, *inter alia*, that the jury was correctly instructed on the elements of the cause of action and on the principles for assessing actual damages. It also found the evidence sufficient to support the jury verdict. 572 F. 2d, at 714–718.

Our grant of certiorari was limited to the punitive damages question. See 439 U. S. 892 (1978). Consequently, for purposes of our analysis, we must take as correct the findings below that IBEW breached its duty of fair representation and that the $40,000 compensatory damages award was proper.

[5] *Deboles* v. *Trans World Airlines, Inc.*, 552 F. 2d 1005, 1019 (CA3), cert. denied, 434 U. S. 837 (1977). See also *Williams* v. *Pacific Maritime Assn.*, 421 F. 2d 1287 (CA9 1970).

[6] See *Butler* v. *Teamsters Local 823*, 514 F. 2d 442, 454 (CA8), cert. denied, 423 U. S. 924 (1975). Under the Eighth Circuit's analysis, plaintiffs may be required to demonstrate that punitive damages are needed to deter future union misconduct. See 514 F. 2d, at 454; *Emmanuel* v. *Omaha Carpenters District Council*, 560 F. 2d 382, 386 (CA8 1977).

union has acted wantonly or in reckless disregard of an employee's rights. See *Harrison* v. *United Transportation Union*, 530 F. 2d 558, 563–564 (CA4 1975), cert. denied, 425 U. S. 958 (1976).[7]

We granted certiorari to resolve this conflict among the Courts of Appeals as to what if any circumstances justify assessing punitive damages against a union that breaches its duty of fair representation. 439 U. S. 892 (1978).

II

This Court first recognized the statutory duty of fair representation in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944), a case arising under the Railway Labor Act. *Steele* held that when Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly. *Id.*, at 202–204; see *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964); *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 564 (1976).[8] The fair representation doctrine thus serves

[7] The court below further determined that the jury instructions comported with this legal standard. The District Court had charged the jury that it could award punitive damages if petitioners acted "maliciously, or wantonly, or oppressively." App. 65.

MR. JUSTICE BLACKMUN surmises that "as a matter of law," the union's conduct "betrayed nothing more than negligence." *Post*, at 53. This conclusion necessarily assumes that there was insufficient evidence of malicious, wanton, or oppressive conduct to justify the jury's punitive damages award. We, however, are unwilling to substitute our judgment for that of the jury, District Court, and Court of Appeals on this essentially evidentiary question. See Tr. 270–271; App. 91–94; 572 F. 2d, at 719; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635–636 (1967).

[8] The duty of fair representation is also implicit in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, because

as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes, supra,* at 182. Under the doctrine, a union must represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements. See, *e. g., Conley* v. *Gibson,* 355 U. S. 41, 46 (1957); *Humphrey* v. *Moore, supra,* at 342; *Hines* v. *Anchor Motor Freight, Inc., supra,* at 563–567. In particular, a union breaches its duty when its conduct is "arbitrary, discriminatory, or in bad faith," as, for example, when it "arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion." *Vaca* v. *Sipes, supra,* at 190, 191.

The right to bring unfair representation actions is judicially "implied from the statute and the policy which it has adopted," *Steele* v. *Louisville & Nashville R. Co., supra,* at 204, and Congress has not specified what remedies are available in these suits.[9] Our function, therefore, is to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace. See 323 U. S., at 204; *Textile Workers* v.

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that statute, like the Railway Labor Act, affords unions exclusive power to represent all employees of a bargaining unit. See, *e. g., Syres* v. *Oil Workers,* 350 U. S. 892 (1955); *Ford Motor Co.* v. *Huffman,* 345 U. S. 330 (1953); *Vaca* v. *Sipes,* 386 U. S., at 177. For a discussion of the similarities between unfair representation suits under the two Acts, see Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 676–718 (1973).

[9] Contrary to the fears expressed in the opinion concurring in the result, *post,* at 59, we express no view on the propriety of punitive awards in suits under the Landrum-Griffin Act. We are concerned here with judicially created remedies for a judicially implied cause of action. Whether the explicit statutory language of 29 U. S. C. §§ 411 and 412 and the accompanying legislative history authorize punitive damages awards obviously involves different considerations.

Lincoln Mills, 353 U. S. 448, 456–457 (1957); *Machinists* v. *Street*, 367 U. S. 740, 759 (1961); cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). Whether awarding punitive damages would comport with this national labor policy is the issue on which the instant case turns.

III

Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974).[10] In respondent's view, this extraordinary sanction is necessary to vindicate an employee's right to fair representation. Because actual damages caused by a union's failure to pursue grievances may be *de minimis*, see *Harrison* v. *United Transportation Union*, *supra*, at 563; *St. Clair* v. *Local Union No. 515*, 422 F. 2d 128, 132 (CA6 1969); see also *infra*, at 50, respondent contends that a strong legal remedy is essential to encourage unfair representation suits and thereby inhibit union misconduct.

We do not doubt that the prospect of lucrative monetary recoveries unrelated to actual injury would be a powerful incentive to bring unfair representation actions. Similarly, the threat of large punitive sanctions would likely affect unions' willingness to pursue individual complaints. However, offsetting these potential benefits is the possibility that punitive awards could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area.

The fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees'

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[10] See W. Prosser, Law of Torts § 2, pp. 9–11 (4th ed. 1971) (hereinafter Prosser); D. Dobbs, Law of Remedies § 3.9, p. 204 (1973); *Scott* v. *Donald*, 165 U. S. 58, 86 (1897).

rights. In approving "resort to the *usual* judicial remedies of injunction and award of damages when appropriate," *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S., at 207 (emphasis added), the Court emphasized that relief in each case should be fashioned to make the injured employee whole. *Id.*, at 206–207. This compensation principle was again invoked in *Vaca* v. *Sipes, supra,* to govern an unfair representation suit for compensatory and punitive damages based on a union's refusal to process a grievance alleging wrongful discharge.[11] The Court there rejected the contention that an order compelling arbitration was the employee's only remedy, and concluded that damages and equitable relief could be awarded when necessary to ensure full compensation. 386 U. S., at 196.[12]

The Court in *Vaca* applied the compensation principle not only to gauge the sufficiency of relief but also to limit union liability. Because an employee can recover in full from his employer for its breach of contract, we reasoned that a union which fails to process a grievance predicated on that breach cannot be held liable for damages attributable to the employ-

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[11] *Vaca* involved a union certified under the National Labor Relations Act and a collective-bargaining agreement that permitted employees to initiate the grievance process, but precluded them from personally pursuing arbitration once grievance procedures were exhausted. 386 U. S., at 175 n. 3. The Railway Labor Act is somewhat more solicitous of individual rights. It authorizes employees who are unsuccessful at the grievance level to seek relief in their own right from the National Railroad Adjustment Board. §§ 3 First (i), (j), 45 U. S. C. §§ 153 First (i), (j).

[12] The compensation principle is also reflected in *Vaca*'s refusal to hold unfair representation claims within the exclusive jurisdiction of the National Labor Relations Board. Because the "public interest in effectuating the policies of the federal labor laws, *not the wrong done the individual employee,* is always the Board's principal concern in fashioning unfair labor practice remedies," we feared that denial of a judicial forum might "frustrate the basic purposes underlying the duty of fair representation." *Vaca* v. *Sipes, supra,* at 182 n. 8, 183 (emphasis added). See also *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U. S. 324, 328–329 (1969).

er's conduct. *Id.*, at 197. Recognizing the "real hardship" that large damages awards could impose on unions, the Court found "no merit in requiring [them] to pay the employer's share of the damages." *Ibid.* To avoid burdening unions beyond the extent necessary to compensate employees for their injuries, we refused to create an exception even for those unions with indemnification rights against employers. *Ibid.* Although acknowledging that this apportionment rule might in some instances effectively immunize unions from liability for a clear breach of duty, the Court found considerations of deterrence insufficient to risk endangering the financial stability of such institutions. *Id.*, at 198. Accordingly, we vacated the jury's award of compensatory and punitive damages against the union since "all or almost all" of the employee's damages were attributable to the discharge. *Ibid.*[13]

This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds. To permit punitive damages, which, by definition, provide monetary relief "in excess of . . . actual loss," *Scott* v. *Donald*, 165 U. S. 58, 86 (1897), could undermine this careful accommodation. Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, see *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349–350; Prosser § 2, pp. 13–14, the impact of these windfall recoveries is unpredictable and potentially substantial. Cf. *Hall* v. *Cole*, 412 U. S. 1, 9 n. 13 (1973).[14] Such awards could deplete union treasuries,

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[13] On similar reasoning, the Court has applied *Vaca*'s apportionment principle to cases arising under the Railway Labor Act. In *Czosek* v. *O'Mara*, 397 U. S. 25, 29 (1970), we held that "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer."

[14] Moreover, it cannot be ignored that punitive damages may be em-

thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have. Cf. *Automobile Workers* v. *Russell*, 356 U. S. 634, 658 (1958) (Warren, C. J., dissenting).

Additionally, the prospect of punitive damages in cases such as this could curtail the broad discretion that *Vaca* afforded unions in handling grievances. We there rejected the notion that employees could force unions to process their claims irrespective of the terms of the collective-bargaining agreement, and ruled that a union satisfies its obligation to represent employees fairly if it does not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Vaca* v. *Sipes*, 386 U. S., at 191–194. In so holding, the Court stressed that union discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. *Id.*, at 191–193. Without these screening and settlement procedures, the Court found that the costs of private dispute resolution could ultimately render the system impracticable. *Ibid.*

Just as unlimited access to the grievance process could undermine collective bargaining, so too the threat of punitive

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ployed to punish unpopular defendants. As we observed in the defamation context:

"[Since] juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger . . . ." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974).

Community hostility toward unions, management, or minority views can thus find expression in punitive awards. See *Automobile Workers* v. *Russell*, 356 U. S. 634, 651 (1958) (Warren, C. J., dissenting).

damages could disrupt the responsible decisionmaking essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members. Absent clear congressional guidance, we decline to inject such an element of uncertainty into union decisions regarding their representative functions.

Acknowledging the "essentially remedial" objectives of the National Labor Relations Act, this Court has refused to permit punitive sanctions in certain unfair labor practice cases, see, *e. g., Republic Steel Corp.* v. *NLRB,* 311 U. S. 7, 10–12 (1940); *Carpenters* v. *NLRB,* 365 U. S. 651, 655 (1961), and in actions under § 303 of the Labor Management Relations Act, 29 U. S. C. § 187, *Teamsters* v. *Morton,* 377 U. S. 252, 260–261 (1964). Like the NLRA, the Railway Labor Act is essentially remedial in purpose. See *supra,* at 47–48; 45 U. S. C. § 151a; *Virginian R. Co.* v. *Railway Employees,* 300 U. S. 515, 542–548 (1937); *Machinists* v. *Street,* 367 U. S., at 759–760; see also *Republic Steel Corp.* v. *NLRB, supra,* at 10–11. Because general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance. Accordingly, we reverse the judgment below insofar as it upheld the award of punitive damages.

So ordered.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS join, concurring in the result.

The Court now adopts a *per se* rule that a union's breach of its duty of fair representation can never render it liable for

punitive damages, no matter how egregious its breach may be. I seriously doubt both the correctness and the wisdom of this holding. Whatever the merits of the Court's *per se* rule, however, there is no need to propound such a blanket proscription in this particular case. The union's conduct here betrayed nothing more than negligence, and thus presented an inappropriate occasion for awarding punitive damages under any formula. In order to dispose of this case, therefore, the Court need hold only that the trial judge erred as a matter of law in submitting the punitive damages issue to the jury; this is the holding I would adopt. Inasmuch as the Court reaches to outlaw punitive damages in *all* unfair representation cases, I shall attempt to show why I think the Court errs and why I concur only in the result.

A

Because the duty of fair representation is judicially created, the consequences of its breach necessarily are left to judicial determination. "The appropriate remedy for a breach of a union's duty of fair representation," the Court wrote in *Vaca* v. *Sipes*, 386 U. S. 171, 195 (1967), "must vary with the circumstances of the particular breach." Depending on the circumstances of the particular breach, the Court wrote in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 207 (1944), "the statute contemplates resort to the usual judicial remedies of injunction and award of damages." These cases make clear that a court, seeking a remedy to match the union's wrong, has at its disposal the full panoply of tools traditionally used by courts to do justice between parties. Punitive damages, being one of these tools, thus are presumptively available for use in appropriate cases, unless Congress has directed otherwise. Since Congress has never expressly interdicted their use, the Court's decision to ban punitive damages from the arsenal necessarily rests upon inference—upon a perception that punitive damages in unfair representation

suits are *per se* inconsistent with "federal labor policy." The Court proffers four main theories to support this inference. I find none of them persuasive.

First, the Court discerns in *Vaca* and *Steele* a "compensation principle," a principle supposedly dictating that a damages award may "make the injured employee whole," but may do no more. *Ante,* at 49, and n. 12. If these cases do embody a "compensation principle"—really, a neologism in this area of the law—it is a principle of a vastly different sort from that on which the Court relies. *Steele* and *Vaca* assuredly do stand for the proposition that a worker injured by his union's breach of duty must *at least* be made whole. In *Steele* the Court held the plaintiffs entitled to a judicial damages remedy inasmuch as no "adequate administrative remedy" was available. 323 U. S., at 206–207. In *Vaca* it refused to find exclusive jurisdiction of unfair representation suits in the National Labor Relations Board, lest victims of union discrimination, owing to the Board's limited remedial powers, on occasion be left remediless. 386 U. S., at 182–183. And in *Vaca* it also refused to limit judicial relief to a decree compelling arbitration of the underlying grievance, reasoning that an arbitrator might lack power to award damages against the union, and holding instead that "the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief." *Id.,* at 196. In *Vaca* and *Steele,* in other words, the Court held that a worker's remedies must *include* damages so that in all cases he would be fully compensated. But in neither case did it hold that the worker's remedies must *exclude* damages to the extent they rise above the full compensation norm. The Court has read into *Vaca*'s affirmative compensation policy a negative pregnant; it has transformed its liberal "compensation principle" into a parsimonious limiting rule; it has converted the floor beneath the injured employee's remedies into a ceiling on top of them.

Vaca and *Steele*, to my mind, contain no such negative pregnant. In *Vaca* the jury had awarded the worker both compensatory and punitive damages, 386 U. S., at 173; the Court held that "such damages are not recoverable from the Union in the circumstances of this case," *id.*, at 195, pointing out that "all or almost all" of the worker's damages were attributable to the employer, not to the union. *Id.*, at 198. *Vaca* stands only for the proposition that a union not chargeable with compensatory damages may not be taxed with punitive damages either. If *Vaca* contains any negative pregnant, it is that when a union *is* chargeable with compensatory damages, it *may* be taxed with punitive damages too. In *Steele*, the Court held that "the statute contemplates resort to the usual judicial remedies of injunction and award of damages." 323 U. S., at 207. This language, read in context, seems expansive to me. The Court now, by italicizing "usual," implies that punitive damages, being an extraordinary sanction, are an "unusual remedy," and hence outside *Steele*'s remedial compass. *Ante*, at 49. This reading is most strained. The Court's italics may make its point clear, but they do not make its argument correct, and they provide no substitute for a fairminded appraisal of what *Steele* says. Neither *Vaca* nor *Steele*, in my view, supports the negative "compensation principle" upon which the Court relies.

The Court's second reason for banishing punitive damages from the pantheon, closely related to the first, is that federal labor policy is "essentially remedial" and hence inhospitable to punitive awards. *Ante*, at 52. The Court cites two major cases to support this theory. Neither is apposite. In *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7 (1940), the Court held that the Board cannot order punitive sanctions. But the question in that case was whether "Congress [had] conferred the power upon the Board to impose such requirements." *Id.*, at 10. The question, in other words, was simply one of the Board's statutory competence; the Court

decided that punitive sanctions were "beyond the Board's authority" and that it lacked "jurisdiction" to impose them. *Id.*, at 11, 13. *Republic Steel* has no pertinence here, since the federal courts have both the jurisdiction and the authority to impose punitive sanctions in their efforts to devise a federal law of remedies. In *Teamsters* v. *Morton*, 377 U. S. 252 (1964), the Court held that punitive damages may not be recovered in § 303 suits for damages from secondary boycotts. But *Morton* was a case of statutory construction. Section 303 expressly authorizes an employer's recovery only of "the damages by him sustained." 29 U. S. C. § 187 (b). "Punitive damages for violation of § 303," the Court reasoned in *Morton*, "conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities . . . should be limited to actual, compensatory damages." 377 U. S., at 260 (footnotes omitted). Since Congress has expressed no such prohibition on punitive damages in unfair representation suits, *Morton* is simply inapposite here. Neither *Republic Steel* nor *Morton*, therefore, supports the Court's invocation of an "essentially remedial" theory in the fair representation area.

The third reason the Court gives in support of its *per se* rule is that punitive damages awards "could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents." *Ante*, at 50–51. It is true that *Vaca*, in enunciating its formula for apportioning damages in wrongful-discharge cases, said that "[i]t could be a real hardship on the union" to pay damages in certain circumstances. 386 U. S., at 197. But the Court was not talking about unions' fiscal soundness; one searches the opinion in vain for references to "depletion of union treasuries" or "impairment of union effectiveness in collective bargaining." What *Vaca* said was that it could be a real hardship to make

a union pay "damages attributable solely to the employer's breach of contract." *Ibid.* It is, obviously, a "real hardship" for anyone, regardless of his wealth, to be forced to pay money for something that was not his fault. And even if *Vaca* were read to evince concern for union treasuries, even in cases where the union *is* at fault, this concern would not support the Court's proscription of punitive damages where the union's fault is *egregious.* As the Court notes, *ante,* at 48, the damages a union will be forced to pay in a typical unfair representation suit are minimal; under *Vaca*'s apportionment formula, the bulk of the award will be paid by the employer, the perpetrator of the wrongful discharge, in a parallel § 301 action. See 386 U. S., at 197–198. Union treasuries, in other words, will emerge unscathed in the general run of unfair representation cases. Given this, it can work no undue hardship on union fiscal soundness to permit punitive awards in those rare cases where the union has notoriously misbehaved.

The fourth theory underpinning the Court's *per se* rule is that "the prospect of punitive damages in cases such as this could curtail the broad discretion that *Vaca* afforded unions in handling grievances," and thus "could disrupt the responsible decisionmaking essential to peaceful labor relations." *Ante,* at 51, 52. The Court's theory seems to be that a union, fearing punitive damages, might become more vigilant in processing workers' grievances; that this vigilance might lead unions to process frivolous grievances; that this frivolity might antagonize the employer; and that this antagonism might beget disharmony at the bargaining table. This reasoning seems tenuous to me. Surely, the Court cannot believe that such airy speculations will induce union shop stewards to abandon all vestiges of common sense as they go about their diurnal chores. And even if the prospect of punitive damages did operate to chill a union's reason "in cases such as this," no Member of the Court is proposing to

award punitive damages "in cases such as this." Everyone agrees that punitive damages here were improper. The question is whether punitive damages are also to be outlawed in cases, unlike this one, where the union's conduct has been truly egregious. A little chilling of union "discretion" in *those* cases would not bother me.

B

The Court's four proffered reasons in support of a *per se* ban on punitive damages thus leave me unpersuaded. I am not alone in feeling this way, for no Court of Appeals to consider the question has embraced the *per se* rule the Court today goes out of its way to adopt. As the Court observes, *ante*, at 45–46, the Fourth Circuit, followed by the Tenth in this case, has approved of punitive damages in unfair representation cases. *Harrison* v. *United Transportation Union*, 530 F. 2d 558, 563–564 (1975), cert. denied, 425 U. S. 958 (1976). The Eighth Circuit has expressed the view that punitive damages may be awarded where the union is guilty of "outrageous or extraordinary conduct." *Butler* v. *Teamsters Local 823*, 514 F. 2d 442, 454, cert denied, 423 U. S. 924 (1975). The Ninth Circuit, while barring punitive damages on the facts, restricted its holding to "grievances of the kind alleged" in the case. *Williams* v. *Pacific Maritime Assn.*, 421 F. 2d 1287, 1289 (1970). Even the Third Circuit, upon whose decision the Court relies to make out a Circuit conflict here, *ante*, at 45–46, declined to embrace the Court's *per se* approach, refusing to "decide whether any circumstances exist in which a punitive-type remedy . . . for union misconduct might be implied under the Railway Labor Act," and holding only that punitive damages were unavailable where (as in that case) no actual damages had been shown. *Deboles* v. *Trans World Airlines, Inc.*, 552 F. 2d 1005, 1019, cert. denied, 434 U. S. 837 (1977).

Equally instructive, in my view, are Court of Appeals cases upholding punitive damages awards in suits brought by workers against unions under the Landrum-Griffin Act. That Act outlines a "bill of rights" for union members, 29 U. S. C. § 411 (a), and provides that actions for violation of those rights may be had to recover "such relief (including injunctions) as may be appropriate." § 412. Every Circuit to consider the question has held that punitive damages are "appropriate relief" when a union's conduct manifests "actual malice or reckless or wanton indifference" to members' speech and associational rights. *Boilermakers* v. *Braswell*, 388 F. 2d 193, 199–201 (CA5), cert. denied, 391 U. S. 935 (1968); *Cooke* v. *Orange Belt Dist. Council*, 529 F. 2d 815, 820 (CA9 1976); *Morrissey* v. *National Maritime Union*, 544 F. 2d 19, 24–25 (CA2 1976); *Keene* v. *IUOE Local 624*, 569 F. 2d 1375, 1381–1382, and n. 8 (CA5 1978). These courts noted that punitive damages would serve a legitimate deterrent purpose in appropriate cases, *Braswell*, 388 F. 2d, at 200; *Cooke*, 529 F. 2d, at 820, and held that "[i]f punitive damages can be awarded against other defendants, they can be awarded against unions as well." *Morrissey*, 544 F. 2d, at 25. This reasoning, I think, is equally in point here. The Court properly reserves decision on Landrum-Griffin cases, *ante*, at 47 n. 9, but its pronouncements about "[t]he compensation principle," about the "windfall" nature of punitive damages, about the need to safeguard union treasuries, and about the "essentially remedial" quality of federal labor policy, all would seem to apply with equal force to § 412 suits, and they leave me uneasy. Although the Court professes willingness to draw hairline distinctions between different types of tort suits brought by workers against unions under federal labor laws, this willingness, in my view, only suggests how tenuous is the evidence of "congressional intent" on which the Court relies to back up its *per se* rule here.

C

The Court of Appeals' unanimous refusal to erect a *per se* bar to punitive damages against unions, both in unfair representation cases and in Landrum-Griffin cases, seems judicious to me. If a union's conduct should reveal intentional racial discrimination, deliberate personal animus, or conscious infringement of speech and associational freedoms, I can discern no principle of federal labor policy that stands in the way of a punitive award. Punitive damages in such an exceptional case will serve at least to deter egregious union conduct, and *Vaca* makes clear that deterrence is a proper objective in unfair representation actions. See 386 U. S., at 187. If the Court feels obliged to devise some "careful balance of individual and collective interests" here, *ante*, at 48, the solution, in my view, is not to ban punitive damages across the board, but to restrict them to their proper sphere, namely, to those rare cases where the union's conduct can truly be described as outrageous.

For these reasons, I would hesitate to embrace the Court's *per se* rule even in a case that squarely presented that question for decision. What I find particularly hard to fathom is the Court's willingness to promulgate a *per se* rule here, where the pronouncement is manifestly unnecessary to decision. This case involves no racial discrimination, no trampling on workers' "bill of rights"; the record does not suggest—indeed, respondent does not even contend—that the union's conduct was motivated by personal hostility. For all this record shows, the union, in neglecting to act promptly on respondent's grievance, was simply following its standard operating procedure, a procedure admittedly inappropriate here, given the time constraints under which the union was operating, but a procedure for whose inappropriateness in this case respondent himself was at least partly responsible, since it was he who failed to notify the union until 52 days of the contract's 60-day limit had expired. The union's conduct, in

other words, was negligent or, at worst, grossly negligent. No court, to my knowledge, has ever held that negligence can form the basis for a proper punitive damages award. Especially should this be so in cases arising under the federal labor statutes.

To decide this case, in sum, the Court need hold only that the trial judge erred as a matter of law in submitting the punitive damages issue to the jury. Because the Court goes further and proscribes punitive awards in much more difficult and questionable situations, not presented here, I cannot join the opinion and I concur in the result only.

PARKER *v.* RANDOLPH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78–99. Argued March 20, 1979—Decided May 29, 1979

Respondents were convicted, after a joint trial in a Tennessee court, of murder committed during the commission of a robbery. None of the respondents took the witness stand, and their oral confessions, found by the trial court to have been freely and voluntarily given, were admitted into evidence through police officers' testimony. Respondent Pickens' written confession was also admitted into evidence over his objection that it had been obtained in violation of his rights under *Miranda* v. *Arizona*, 384 U. S. 436. The trial court instructed the jury that each confession could be used only against the defendant who gave it and could not be considered as evidence of a codefendant's guilt. Ultimately, the Tennessee Supreme Court upheld the convictions, holding that admission of repondents' confessions did not violate the rule of *Bruton* v. *United States*, 391 U. S. 123, which held that a defendant's rights under the Confrontation Clause of the Sixth Amendment were violated by the admission, at a joint trial, of the confession of a codefendant who did not take the stand. Respondents subsequently obtained writs of habeas corpus in a Federal District Court, which held that respondents' rights under *Bruton* had been violated and that introduction of respondent Pickens' written confession had violated his rights under *Miranda*. The Court of Appeals affirmed.

Held: The judgment is affirmed as to respondent Pickens and reversed as to the other respondents. Pp. 69–77; 77–81.

575 F. 2d 1178, affirmed in part and reversed in part.

MR. JUSTICE REHNQUIST delivered the opinion of the Court with respect to Parts I and III, concluding that since the grant of certiorari was limited to the *Bruton* issue, the Court had no occasion to pass on the merits of the ruling that respondent Pickens' rights under *Miranda* had been violated. Pp. 76–77.

MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, concluded, in Part II, that admission of respondents' confessions with proper limiting jury instructions did

not infringe respondents' right of confrontation secured by the Sixth and Fourteenth Amendments. Pp. 69–76.

(a) In *Bruton*, introduction at a joint trial of a nontestifying codefendent's confession had a "devastating" effect on the nonconfessing defendant's case. Introduction of such incriminating extrajudicial statements of a codefendant will seldom, if ever, have the same "devastating" consequences to a defendant who has himself confessed. The constitutional right of cross-examination protected by *Bruton* has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Pp. 72–73.

(b) Nor does the natural "motivation to shift blame onto others," recognized in *Bruton* to render the incriminating statements of codefendants "inevitably suspect," require application of the *Bruton* rule when the incriminated defendant has corroborated his codefendant's statements by heaping blame onto himself. P. 73.

(c) The Confrontation Clause does not bar admission into evidence of every relevant extrajudicial statement by a nontestifying declarant simply because it in some way incriminates the defendant. And an instruction directing the jury to consider a codefendant's extrajudicial statement only against its source is generally sufficient to avoid offending the implicated defendant's confrontation right. Pp. 73–74.

(d) When the defendant's own confession is properly before the jury, as here, the possible prejudice resulting from the jury's failure to follow the trial court's instructions is not so "devastating" or "vital" to the confessing defendant as to require departure from the general rule allowing admission of evidence with limiting instructions. Pp. 74–75.

MR. JUSTICE BLACKMUN would not find the rule of *Bruton* to be inapplicable simply because interlocking confessions are involved. Rather, even where the confessions of nontestifying codefendants overlap to some degree, he would follow the analysis indicated by *Bruton* and then determine whether the error was harmless beyond a reasonable doubt. On the facts of this case, he concludes that any error was clearly harmless beyond a reasonable doubt. Pp. 77–81.

REHNQUIST, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I and III, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined, and an opinion with respect to Part II, in which BURGER, C. J., and STEWART and WHITE, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 77. STEVENS, J., filed a dissenting opin-

ion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 81. POWELL, J., took no part in the consideration or decision of the case.

Michael E. Terry, Assistant Attorney General of Tennessee, argued the cause for petitioner. With him on the brief were *William M. Leech, Jr.*, Attorney General, and *Robert E. Kendrick*, Deputy Attorney General.

Walter L. Evans, by appointment of the Court, 439 U. S. 1064, argued the cause and filed a brief for respondents.

MR. JUSTICE REHNQUIST delivered the opinion of the Court (Parts I and III) together with an opinion (Part II), in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE joined, and announced the judgment of the Court.

In *Bruton* v. *United States*, 391 U. S. 123 (1968), this Court reversed the robbery conviction of a defendant who had been implicated in the crime by his codefendant's extrajudicial confession. Because the codefendant had not taken the stand at the joint trial and thus could not be cross-examined, the Court held that admission of the codefendant's confession had deprived the defendant of his rights under the Confrontation Clause of the Sixth Amendment. The issue before us in this case is whether *Bruton* requires reversal of a defendant's conviction when the defendant himself has confessed and his confession "interlocks" with and supports the confession of his codefendant. We hold that it does not.

I

Respondents were convicted of murder committed during the commission of a robbery and were sentenced to life imprisonment. The cast of characters playing out the scenes that led up to the fatal shooting could have come from the pen of Bret Harte.[1] The story began in June 1970, when

[1] As the Court of Appeals aptly commented: "This appeal involves a sequence of events which have the flavor of the old West before the law

one William Douglas, a professional gambler from Las Vegas, Nev., arrived in Memphis, Tenn., calling himself Ray Blaylock and carrying a gun and a deck of cards. It ended on the evening of July 6, 1970, when Douglas was shot and killed in a Memphis apartment.

Testimony at the trial in the Tennessee state court showed that one Woppy Gaddy, who was promised a cut of Douglas' take, arranged a game of chance between Douglas and Robert Wood, a sometime Memphis gambler. Unwilling to trust the outcome of the contest entirely to luck or skill, Douglas marked the cards, and by game's end Robert Wood and his money had been separated. A second encounter between the two men yielded similar results, and Wood grew suspicious of Douglas' good fortune. In order to determine whether and how Douglas was cheating, Wood brought to the third game an acquaintance named Tommy Thomas, who had a reputation of being a "pretty good poker player." Unknown to Wood, however, Thomas' father and Douglas had been close friends; Thomas, predictably, threw in his lot with Douglas, purposefully lost some $1,000, and reported to Wood that the game was clean. Wood nonetheless left the third game convinced that he was being cheated and intent on recouping his now considerable losses. He explained the situation to his brother, Joe E. Wood, and the two men decided to relieve Douglas of his ill-gotten gains by staging a robbery of the upcoming fourth game.

At this juncture respondents Randolph, Pickens, and Hamilton entered the picture. To carry out the staged robbery, Joe Wood enlisted respondent Hamilton, who was one of his employees, and the latter in turn associated respondents Randolph and Pickens. Douglas and Robert Wood sat down to the fourth and final contest on the evening of July 6, 1970. Joe Wood and Thomas were present in the room as spectators.

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ever crossed the Pecos. The difference is that here there are no heroes and here there was a trial." 575 F. 2d 1178, 1179 (CA6 1978).

During the course of the game, Douglas armed himself with a .38-caliber pistol and an automatic shotgun; in response to this unexpected development Joe Wood pulled a derringer pistol on Douglas and Thomas, gave the gun to Robert Wood, and left to tell respondents to move in on the game. Before respondents arrived, however, Douglas reached for his pistol and was shot and killed by Robert Wood. Moments later, respondents and Joe Wood broke down the apartment door, Robert Wood gathered up the cash left on the table, and the gang of five fled into the night. Respondents were subsequently apprehended by the police and confessed to their involvement in the crime.

Respondents and the Wood brothers were jointly tried and convicted of murder during the commission of a robbery. Tenn. Code Ann. § 39–2402 (1975).[2] Each defendant was sentenced to life imprisonment. Robert Wood took the stand at trial, admitting that he had killed Douglas, but claiming that the shooting was in self-defense. Thomas described Douglas' method of cheating at cards and admitted his complicity in the fraud on Robert Wood. He also testified in substance that he was present in the room when Joe Wood produced the derringer and when Robert Wood shot and killed Douglas.

None of the respondents took the stand. Thomas could not positively identify any of them, and although Robert Wood named Hamilton as one of the three men involved in the staged robbery, he did not clearly identify Randolph and Pickens as the other two. The State's case against respondents thus rested primarily on their oral confessions, found by

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[2] Tennessee Code Ann. § 39–2402 (1975) provides in pertinent part as follows:

"An individual commits murder in the first degree if . . .

"(4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb."

the trial court to have been freely and voluntarily given, which were admitted into evidence through the testimony of several officers of the Memphis Police Department.[3] A written confession signed by Pickens was also admitted into evidence over his objection that it had been obtained in violation of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The trial court instructed the jury that each confession could be used only against the defendant who gave it and could not be considered as evidence of a codefendant's guilt.

The Tennessee Court of Criminal Appeals reversed respondents' convictions, holding that they could not be guilty of felony murder since Douglas had been shot before they arrived on the scene and, alternatively, that admission of their confessions at the joint trial violated this Court's decision in *Bruton*. The Tennessee Supreme Court in turn reversed the Court of Criminal Appeals and reinstated the convictions. Because "each and every defendant either through words or actions demonstrated his knowledge that 'killing may be necessary,'" App. 237, the court held that respondents' agreement to participate in the robbery rendered them liable under the Tennessee felony-murder statute for Douglas' death. The Tennessee Supreme Court also disagreed with the Court of Criminal Appeals that *Bruton* had been violated, emphasizing that the confession at issue in *Bruton* had inculpated a *nonconfessing* defendant in a joint trial at which neither defendant took the stand. Here, in contrast, the "interlocking inculpatory confessions" of respondents Randolph, Pickens, and Hamilton, "clearly demonstrated the involvement of each, as to crucial facts such as time, location, felonious activity, and

[3] Each of the confessions was subjected to a process of redaction in which references by the confessing defendant to other defendants were replaced with the words "blank" or "another person." As the Court of Appeals for the Sixth Circuit observed below, the confessions were nevertheless "such as to leave no possible doubt in the jurors' minds concerning the 'person[s]' referred to." 575 F. 2d, at 1180.

awareness of the overall plan or scheme." App. 245. Accordingly, the Tennessee Supreme Court concluded: "The fact that jointly tried codefendants have confessed precludes a violation of the *Bruton* rule where the confessions are similar in material aspects." *Ibid.*, quoting *State* v. *Elliott*, 524 S. W. 2d 473, 477–478 (Tenn. 1975).

The United States District Court for the Western District of Tennessee thereafter granted respondents' applications for writs of habeas corpus, ruling that their rights under *Bruton* had been violated and that introduction of respondent Pickens' uncounseled written confession had violated his rights under *Miranda* v. *Arizona*, *supra*. The Court of Appeals for the Sixth Circuit affirmed, holding that admission of the confessions violated the rule announced in *Bruton* and that the error was not harmless since the evidence against each respondent, even considering his confession, was "not so overwhelming as to compel the jury verdict of guilty . . . ." 575 F. 2d 1178, 1182 (1978). The Court of Appeals frankly acknowledged that its decision conflicts with decisions of the Court of Appeals for the Second Circuit holding the *Bruton* rule inapplicable "[w]here the jury has heard not only a codefendant's confession but the defendant's own [interlocking] confession . . . ." *United States ex rel. Catanzaro* v. *Mancusi*, 404 F. 2d 296, 300 (1968), cert. denied, 397 U. S. 942 (1970). Accord, *United States ex rel. Stanbridge* v. *Zelker*, 514 F. 2d 45, 48–50, cert. denied, 423 U. S. 872 (1975); *United States ex rel. Duff* v. *Zelker*, 452 F. 2d 1009, 1010 (1971), cert. denied, 406 U. S. 932 (1972). We granted certiorari in this case to resolve that conflict.[4] 439 U. S. 978 (1978).

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[4] The conflict extends throughout the Courts of Appeals. The Courts of Appeals for the Third and Sixth Circuits have expressly ruled that the *Bruton* rule applies in the context of interlocking confessions, see *Hodges* v. *Rose*, 570 F. 2d 643 (CA6 1978); *United States* v. *DiGilio*, 538 F. 2d 972, 981–983 (CA3 1976), cert. denied *sub nom. Lupo* v. *United States*, 429 U. S. 1038 (1977), and the Court of Appeals for the Ninth Circuit has

II

In *Delli Paoli* v. *United States*, 352 U. S. 232 (1957), a nontestifying codefendant's confession, which incriminated a defendant who had not confessed, was admitted at a joint trial over defendant's hearsay objection. Concluding that "it was reasonably possible for the jury to follow" the trial court's instruction to consider the confession only against the declarant, this Court held that admission of the confession did not constitute reversible error. Little more than a decade later, however, *Delli Paoli* was expressly overruled in *Bruton* v. *United States*. In that case, defendants Bruton and Evans were convicted of armed postal robbery after a joint trial. Although Evans did not take the stand, a postal inspector was allowed to testify that Evans had orally confessed to having committed the robbery with Bruton. The trial judge instructed the jury that Evans' confession was competent evidence against Evans, but was inadmissible hearsay against

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done so impliedly, see *Ignacio* v. *Guam*, 413 F. 2d 513, 515–516 (1969), cert. denied, 397 U. S. 943 (1970). In addition to the Court of Appeals for the Second Circuit, at least four other Courts of Appeals have rejected the *Bruton* claims of confessing defendants. Cases from the Fifth and Seventh Circuits have reasoned that the *Bruton* rule does not apply in the context of interlocking confessions and that, even if it does, the error was harmless beyond a reasonable doubt. See *Mack* v. *Maggio*, 538 F. 2d 1129, 1130 (CA5 1976); *United States* v. *Spinks*, 470 F. 2d 64, 65–66 (CA7), cert. denied, 409 U. S. 1011 (1972). Two other Courts of Appeals have rejected the *Bruton* claims of confessing defendants, refusing to concern themselves "with the legal nicety as to whether the . . . case is 'without' the *Bruton* rule, or is 'within' *Bruton* [and] the violation thereof constitut[es] only harmless error." *Metropolis* v. *Turner*, 437 F. 2d 207, 208–209 (CA10 1971); accord, *United States* v. *Walton*, 538 F. 2d 1348, 1353–1354 (CA8), cert. denied, 429 U. S. 1025 (1976). State-court decisions in this area are in similar disarray. Compare, *e. g.*, *Stewart* v. *State*, 257 Ark. 753, 519 S. W. 2d 733 (1975), and *People* v. *Moll*, 26 N. Y. 2d 1, 256 N. E. 2d 185, cert. denied *sub nom. Stanbridge* v. *New York*, 398 U. S. 911 (1970), with *People* v *Rosochacki*, 41 Ill. 2d 483, 244 N. E. 2d 136 (1969), and *State* v. *Oliver*, 160 Conn. 85, 273 A. 2d 867 (1970).

Bruton and therefore could not be considered in determining Bruton's guilt.

This Court reversed Bruton's conviction, noting that despite the trial court's admittedly clear limiting instruction, "the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination." 391 U. S., at 127–128. Bruton was therefore held to have been denied his Sixth Amendment right of confrontation. The *Bruton* court reasoned that although in many cases the jury can and will follow the trial judge's instruction to disregard inadmissible evidence,

> "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Id.*, at 135–136 (citations and footnotes omitted).

One year after *Bruton* was decided, this Court rejected the notion that erroneous admission at a joint trial of evidence such as that introduced in *Bruton* automatically requires reversal of an otherwise valid conviction. See *Harrington* v. *California*, 395 U. S. 250 (1969). In some cases, the properly

admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that introduction of the admission at trial was harmless error.[5]

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[5] In *Harrington* v. *California*, 395 U. S. 250 (1969), four defendants were found guilty of murder after a joint trial. Defendant Harrington's extrajudicial statements placed him at the scene of the crime, but "fell short of a confession." *Id.*, at 252. His three codefendants, however, confessed, and their confessions were introduced at trial with the instruction that the jury was to consider each confession only against its source. One of Harrington's codefendants, whose confession implicated Harrington, took the stand and was subject to cross-examination. The other two codefendants, whose statements corroborated Harrington's admitted presence at the scene of the crime, did not take the stand. Noting the overwhelming evidence of Harrington's guilt, and the relatively insignificant prejudicial impact of his codefendants' statements, the Court held that "the lack of opportunity to cross-examine [the non-testifying co-defendants] constituted harmless error under the rule of *Chapman* [v. *California*, 386 U. S. 18 (1967)]." *Id.*, at 253.

On two subsequent occasions, this Court has applied the harmless-error doctrine to claimed violations of *Bruton*. In *Schneble* v. *Florida*, 405 U. S. 427 (1972), Schneble and a codefendant were found guilty of murder following a joint trial. Although neither defendant took the stand, police officers were allowed to testify as to a detailed confession given by Schneble and a statement given by his codefendant which tended to corroborate certain portions of Schneble's confession. We assumed, without deciding, that admission of the codefendant's statement had violated *Bruton*, but held that in view of the overwhelming evidence of Schneble's guilt and the comparatively insignificant impact of the codefendant's statement, "any violation of *Bruton* that *may* have occurred at petitioner's trial was harmless [error] beyond a reasonable doubt." 405 U. S., at 428 (emphasis added).

In *Brown* v. *United States*, 411 U. S. 223 (1973), the prosecution introduced police testimony regarding extrajudicial statements made by two nontestifying codefendants. Each statement implicated both of the codefendants in the crimes charged. Neither codefendant took the stand, and the police testimony was admitted into evidence at their joint trial. Because the Solicitor General conceded that the statements were admitted into evidence in violation of *Bruton*, we had no occasion to consider the question whether introduction of the interlocking confessions violated

Petitioner urges us to follow the reasoning of the Court of Appeals for the Second Circuit and to hold that the *Bruton* rule does not apply in the context of interlocking confessions. Alternatively, he contends that if introduction of interlocking confessions at a joint trial does violate *Bruton*, the error is all but automatically to be deemed harmless beyond a reasonable doubt. We agree with petitioner that admission at the joint trial of respondents' interlocking confessions did not infringe respondents' right of confrontation secured by the Sixth and Fourteenth Amendments to the United States Constitution, but prefer to cast the issue in a slightly broader form than that posed by petitioner.

Bruton recognized that admission at a joint trial of the incriminating extrajudicial statements of a nontestifying codefendant can have "devastating" consequences to a nonconfessing defendant, adding "substantial, perhaps even critical, weight to the Government's case." 391 U. S., at 128. Such statements go to the jury untested by cross-examination and, indeed, perhaps unanswered altogether unless the defendant waives his Fifth Amendment privilege and takes the stand. The prejudicial impact of a codefendant's confession upon an incriminated defendant who has, insofar as the jury is concerned, maintained his innocence from the beginning is simply too great in such cases to be cured by a limiting instruction. The same cannot be said, however, when the defendant's own confession—"probably the most probative and damaging evidence that can be admitted against him," *id.*, at 139 (WHITE, J., dissenting)—is properly introduced at trial. The defendant is "the most knowledgeable and unimpeachable source of information about his past conduct," *id.*, at 140

Bruton. Proceeding from the Solicitor General's concession, we held that the police testimony "was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." 411 U. S., at 251. Thus, any *Bruton* error was harmless beyond a reasonable doubt.

(WHITE, J., dissenting), and one can scarcely imagine evidence more damaging to his defense than his own admission of guilt. Thus, the incriminating statements of a codefendant will seldom, if ever, be of the "devastating" character referred to in *Bruton* when the incriminated defendant has admitted his own guilt. The right protected by *Bruton*—the "constitutional right of cross-examination," *id.*, at 137—has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged. Nor does the natural "motivation to shift blame onto others," recognized by the *Bruton* Court to render the incriminating statements of codefendants "inevitably suspect," *id.*, at 136, require application of the *Bruton* rule when the incriminated defendant has corroborated his codefendant's statements by heaping blame onto himself.

The right of confrontation conferred by the Sixth Amendment is a safeguard to ensure the fairness and accuracy of criminal trials, see *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970), and its reach cannot be divorced from the system of trial by jury contemplated by the Constitution. A crucial assumption underlying that system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed. The Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant. See, *e. g.*, *id.*, at 80; *Mattox* v. *United States*, 156 U. S. 237, 240–244 (1895). And an instruction directing the jury to consider a codefendant's extrajudicial statement only against its source has been found sufficient to

avoid offending the confrontation right of the implicated defendant in numerous decisions of this Court.[6]

When, as in *Bruton*, the confessing codefendant has chosen not to take the stand and the implicated defendant has made no extrajudicial admission of guilt, limiting instructions cannot be accepted as adequate to safeguard the defendant's rights under the Confrontation Clause. Under such circumstances, the "practical and human limitations of the jury system," *Bruton* v. *United States*, *supra*, at 135, override the theoretically sound premise that a jury will follow the trial court's instructions. But when the defendant's own confession is properly before the jury, we believe that the constitutional scales tip the other way. The possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so "devastating" or "vital" to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting

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[6] In *Opper* v. *United States*, 348 U. S. 84 (1954), petitioner contended that the trial court had erred in overruling his motion for severance, arguing that the jury may have improperly considered statements of his codefendant, which were inadmissible as to petitioner, in finding petitioner guilty. This Court rejected the contention:

"It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. The record contains substantial competent evidence upon which the jury could find petitioner guilty." *Id.*, at 95 (footnote omitted).

See, *e. g.*, *Blumenthal* v. *United States*, 332 U. S. 539, 552–553 (1947).

instructions.[7] We therefore hold that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution.[8] Accordingly, the judg-

[7] MR. JUSTICE STEVENS characterizes our decision as an attempt "to create a vaguely defined exception" to the *Bruton* rule for cases involving interlocking confessions, *post*, at 82, and suggests that the "proposed exception" is designed "to limit the effect of [the *Bruton*] rule to the largely irrelevant set of facts in the case that announced it." *Post*, at 87. First, the dissent describes what we believe to be the "rule" as the "exception." The "rule"—indeed, the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court's instructions. *Bruton* was an exception to this rule, created because of the "devastating" consequences that failure of the jury to disregard a codefendant's inculpatory confession could have to a nonconfessing defendant's case. We think it entirely reasonable to apply the general rule, and not the *Bruton* exception, when the defendant's case has already been devastated by his own extrajudicial confession of guilt.

Second, under the reasoning of *Bruton*, its facts were anything but "irrelevant" to its holding. The *Bruton* Court recognized:

"[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here . . . ." 391 U. S., at 135.

Clearly, *Bruton* was tied to the situation in which it arose: "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." *Id.*, at 135–136.

[8] MR. JUSTICE STEVENS, in dissent, states that our holding "squarely overrule[s]" this Court's decisions in *Roberts* v. *Russell*, 392 U. S. 293 (1968); *Hopper* v. *Louisiana*, 392 U. S. 658 (1968); *Brown* v. *United States*, 411 U. S. 223 (1973); and *Harrington* v. *California*, 395 U. S. 250 (1969). "In all four of these cases," according to the dissent, "the Court found a *Bruton* error even though the defendants' confessions interlocked." *Post*, at 83 n. 3. We disagree.

We think that the dissent fails both to note significant factual distinctions between the present case and *Roberts* v. *Russell*, *supra*, and to recognize the difference in precedential value between decisions of this

ment of the Court of Appeals as to respondents Hamilton and Randolph is reversed.

III

The Court of Appeals affirmed the District Court's granting of habeas corpus relief to respondent Pickens on the additional

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Court which have been fully argued and disposed of on their merits and unargued summary dispositions, a difference which we noted in *Edelman* v. *Jordan*, 415 U. S. 651, 670–671 (1974). In *Roberts* "[t]he facts parallel[ed] the facts in *Bruton*." 392 U. S., at 293. Petitioner was convicted of armed robbery after a joint trial in which a codefendant's confession inculpating petitioner was introduced through the testimony of a police officer. Petitioner's cousin testified at trial that petitioner had "indicated that he thought . . . Tennessee was an easy place to commit a robbery." App. to Brief in Opposition, O. T. 1967, No. 920, Misc., p. 4. This extrajudicial statement, while inculpatory, was by no stretch of the imagination a "confession." The District Court denied petitioner's application for a writ of habeas corpus, expressly relying on the authority of *Delli Paoli* v. *United States*, 352 U. S. 232 (1957), and the Court of Appeals affirmed. This Court subsequently overruled *Delli Paoli* in *Bruton*, and granted the petition for certiorari in *Roberts* to consider "the question whether *Bruton* [was] to be applied retroactively." *Roberts* v. *Russell*, *supra*, at 293. The Court decided the question affirmatively, vacated the judgment of the Court of Appeals, and remanded the case to the District Court for further consideration in light of *Bruton*, in no way passing on the merits of petitioner's *Bruton* claim. Thus, *Roberts*, contrary to the dissent's reading, neither involved interlocking confessions nor "found a *Bruton* error."

Hopper v. *Louisiana*, *supra*, came to this Court in much the posture as *Roberts*. Petitioners' manslaughter convictions were affirmed by the Louisiana Supreme Court when *Delli Paoli* was still good law, but while their petition for certiorari was pending before this Court, *Bruton* was decided. In a two-sentence summary disposition, this Court granted petitioners' petition for certorari, vacated the judgment of the Louisiana Supreme Court, and remanded the case "for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123, and *Roberts* v. *Russell*, [392 U. S.] 293." 392 U. S., at 658. Not having passed on the merits of petitioners' *Bruton* claim, this Court can hardly be said to have "found a *Bruton* error" in *Hopper*.

The dissent, we believe, likewise misreads *Harrington* v. *Califonia*, *supra*, and *Brown* v. *United States*, *supra*, as our discussion of those cases in n. 5, *supra*, reveals.

ground that his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), had been violated. Although petitioner sought review of this ruling, our grant of certiorari was limited to the *Bruton* issue. We thus have no occasion to pass on the merits of the Court of Appeals' *Miranda* ruling. Accordingly, the judgment of the Court of Appeals as to respondent Pickens is affirmed.

Affirmed in part and reversed in part.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I and III of the principal opinion and concur in the Court's judgment affirming in part and reversing in part the judgment of the Court of Appeals.

For me, any error that existed in the admission of the confessions of the codefendants, in violation of *Bruton* v. *United States*, 391 U. S. 123 (1968), was, on the facts of this case, clearly harmless beyond a reasonable doubt. I refrain from joining Part II of the principal opinion because, as I read it, it abandons the harmless-error analysis the Court previously has applied in similar circumstances and now adopts a *per se* rule to the effect that *Bruton* is inapplicable in an interlocking confession situation.

In *Bruton*, of course, the Court held that the admission in a joint trial of the confession of a codefendant who did not take the stand violated the Sixth Amendment confrontation right of the other defendant. Because in most cases the impact of admitting a codefendant's confession is severe, and because the credibility of any such confession "is inevitably suspect," *id.*, at 136, the Court went on to hold that a limiting jury instruction could not alleviate the resultant substantial threat to a fair trial the Confrontation Clause was designed to protect. *Id.*, at 136–137.

In *Harrington* v. *California*, 395 U. S. 250 (1969), however, the Court recognized that evidence of guilt could be sufficiently overwhelming so as to render any *Bruton* error "harmless beyond a reasonable doubt," under *Chapman* v. *California*, 386 U. S. 18 (1967). Reversal of a conviction, then, was not required merely because of the existence of a *Bruton* error. The Court applied a similar harmless-error analysis in *Schneble* v. *Florida*, 405 U. S. 427 (1972), a case concerning the defendant's own confession and a partially corroborating statement given by a nontestifying codefendant.

In the present case, the principal opinion appears to me to depart from this harmless-error approach and analysis to hold that *Bruton* simply does not apply in a case involving interlocking confessions. It concludes that in circumstances where one defendant has confessed, the interlocking confession of a codefendant "will seldom, if ever, be of the 'devastating' character referred to in *Bruton*." *Ante*, at 73. Similarly, it finds that the fact that the confession of a codefendant is "inevitably suspect" is of little weight where interlocking confessions are in evidence. *Ibid.* Thus, it holds that the right protected by *Bruton*, *i. e.*, the Confrontation Clause right of cross-examination, "has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence." *Ibid.* Accordingly, it concludes "that admission of interlocking confessions with proper limiting instructions conforms to the requirements" of the Constitution. *Ante*, at 75.

The Court has not departed heretofore from a harmless-error approach in *Bruton* cases. It is unclear where the present analysis will lead in cases where interlocking confessions are not in issue, but where any *Bruton* error appears harmless under *Chapman;* for where the *Bruton* error is harmless, the error in admitting the nontestifying codefendant's confession will be far from devastating. I would be unwilling to depart from the traditional harmless-error anal-

ysis in the straightforward *Bruton*-error situation. Neither would I depart from the harmless-error approach in interlocking confession cases. The fact that confessions may interlock to some degree does not ensure, as a *per se* matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such circumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking. I fully recognize that in most interlocking-confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt. Even so, I would not adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects.

It is possible, of course, that the new approach will result in no more than a shift in analysis. Instead of focusing on whether the error was harmless, defendants and courts will be forced, instead, to inquire whether the confessions were sufficiently interlocking so as to permit a conclusion that *Bruton* does not apply. And I suppose that after making a determination that the confessions did not interlock to a sufficient degree, the court then would have to make a harmless-

error determination anyway, thus adding another step to the process.

Unfortunately, it is not clear that the new approach mandates even an inquiry whether the confessions interlock. Respondents have argued that the confessions in this case, in fact, did not interlock. Brief for Respondents 34–38. The principal opinion, however, simply assumes the interlock. It thus comes close to saying that so long as all the defendants have made some type of confession which is placed in evidence, *Bruton* is inapplicable without inquiry into whether the confessions actually interlock and the extent thereof. If it is willing to abandon the factual inquiry that accompanies a harmless-error determination, it should be ready, at least, to substitute an inquiry into whether there is genuine interlocking before it casts the application of *Bruton*, and the underlying Confrontation Clause right, completely aside.

I merely add that in this case, any *Bruton* error, in my view, clearly was harmless. The principal issue concerning respondents at trial was whether three Negro males identified by a number of witnesses as having been at the murder scene were indeed the respondents. Each confession placed the confessing respondent at the scene of the killing. Each confession implicated the confessor in the Woods' plan to rob the poker game. Each confession largely overlapped with and was cumulative to the others. Corroborative testimony from witnesses who were in the apartment placed respondent Hamilton at the scene of the murder and tentatively identified respondent Randolph as one of the Negroes who received a share of the proceeds in Hamilton's apartment immediately after the killing. The testimony of five witnesses to the events outside the apartment strongly corroborated the confessions. In these circumstances, considering the confession of each respondent against him, I cannot believe that "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction."

Schneble v. *Florida*, 405 U. S., at 432. Reversal on the *Bruton* issue, therefore, is required.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

As MR. JUSTICE BLACKMUN makes clear, *ante*, at 77–78, proper analysis of this case requires that we differentiate between (1) a conclusion that there was no error under the rule of *Bruton* v. *United States*, 391 U. S. 123, and (2) a conclusion that even if constitutional error was committed, the possibility that inadmissible evidence contributed to the conviction is so remote that we may characterize the error as harmless. Because MR. JUSTICE BLACKMUN properly rejects the first conclusion, my area of disagreement with him is narrow. In my view, but not in his, the concurrent findings of the District Court and the Court of Appeals that the error here was not harmless [1] preclude this Court from reaching a

[1] As Judge Edwards noted, writing for the Court of Appeals:

"In evaluating the question of harmless error in this case, it is important to point out the factors which might affect a jury's verdict in relation to these three defendants in separate trials where the *Bruton* rule was observed:

"1) Randolph, Pickens and Hamilton were not involved in the gambling game between Douglas, the Las Vegas gambler, and Robert Wood, the hometown gambler who got cheated.

"2) They were not involved in originating the plan for recouping Robert Wood's losses.

"3) They were not in the room (and had not been) when Robert Wood killed Douglas.

"4) Indeed, the jury could conclude from the admissible evidence in this case that when Joe Wood pulled out his pistol, the original plan for three 'unknown' blacks to rob the all-white poker game was aborted and that petitioners' subsequent entry into the room did not involve them in the crime of murder.

"Additionally, if we return to consideration of the joint trial, that jury as charged by the state court judge had the responsibility of determining whether or not any of the three confessions testified to by Memphis police was voluntarily given. Assuming that two of the three confessions had

different result on this kind of issue. *E. g., Berenyi* v. *Immigration Director*, 385 U. S. 630, 635; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. But see opinion of MR. JUSTICE BLACKMUN, *ante*, at 80–81.

My area of disagreement with the plurality opinion is far wider and prompts more extended remarks. The plurality adopts the first conclusion above—that no constitutional error was committed when the confessions of all three respondents were admitted into evidence at their joint trial. Without purporting to modify the *Bruton* rule precluding the use of a nontestifying codefendant's extrajudicial admissions against a defendant in a joint trial, the plurality reaches this conclusion by attempting to create a vaguely defined exception for cases in which there is evidence that the defendant has also made inculpatory statements which he does not repudiate at trial.[2]

If ever adopted by the Court, such an exception would

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been removed from jury consciousness by adherence to *Bruton*, we find it impossible to conclude that the jury finding and ultimate verdict would, 'beyond reasonable doubt,' have been the same.

"These factors serve to distinguish this case from *Harrington* v. *California*, [395 U. S. 250,] and *Schneble* v. *Florida*, [405 U. S. 427,] and to convince us that the *Bruton* errors found by the District Judge cannot (as he also held) be determined to be harmless beyond reasonable doubt." 575 F. 2d 1178, 1182–1183.

[2] As MR. JUSTICE BLACKMUN points out, *ante*, at 78–79, it is unclear whether the plurality restricts its analysis to "interlocking" confessions, opinion of MR. JUSTICE REHNQUIST, *ante*, at 75 (and, if so, what an "interlock" is), or whether a "broader" exception is established for *all* confessions. *Ante*, at 72. Indeed, its opinion does not explain how inculpatory a statement must be before it qualifies as a "confession," an "extrajudicial admission of guilt," or a "statemen[t] . . . heaping blame onto [oneself]." *Ante*, at 73, 74. Moreover, the plurality variously states its test as applicable "when[ever] the incriminated defendant has [once] admitted his own guilt" (*i. e.*, whenever he has not "maintained his innocence from the beginning"), or only when he has once confessed *and* has left his "admission of guilt . . . before the jury unchallenged" by any evidence of its invalidity. *Ante*, at 72, 73.

seriously undercut the Court's decision in *Bruton* by limiting its effect to a small and arbitrarily selected class of cases. Indeed, its adoption would squarely overrule holdings in four decisions of this Court that applied the rule of *Bruton*.[3]

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[3] In *Roberts* v. *Russell*, 392 U. S. 293, petitioner and a codefendant were jointly tried and convicted of armed robbery, to which the codefendant had confessed, implicating petitioner. In addition, petitioner's cousin testified that petitioner made certain inculpatory statements to him concerning the robbery—statements that the State Supreme Court relied upon heavily in upholding the jury finding of petitioner's guilt. App. to Brief in Opposition, O. T. 1967, No. 920, Misc., pp. 4, 6. That court also held that the redaction of the codefendant's confession to omit the references to petitioner as well as a cautionary instruction to the jury to consider the confession as evidence against the codefendant alone was sufficient to avoid any problem under the Confrontation Clause. On habeas corpus, the District Court and the Court of Appeals agreed. This Court granted the writ of certiorari and summarily vacated the conviction and remanded for reconsideration in light of *Bruton*. In so doing, it established both that the *Bruton* rule applied to the States and that it was retroactive. 392 U. S., at 294–295.

Similarly, in *Hopper* v. *Louisiana*, 392 U. S. 658, the Court vacated the convictions of two defendants both of whom had made full confessions that were introduced at their joint trial with the usual cautionary instructions. See 251 La. 77, 104, 203 So. 2d 222, 232–233 (1967). On remand, the Louisiana Supreme Court held that the *Bruton* errors as to both defendants were harmless beyond a reasonable doubt in light of the overwhelming untainted evidence inculpating both, 253 La. 439, 218 So. 2d 551 (1969), and this Court denied certiorari. 396 U. S. 1012.

In two subsequent decisions, the Court held that error had been committed under the rule of *Bruton*, although it found the error to be harmless. *Brown* v. *United States*, 411 U. S. 223, 230–231; *Harrington* v. *California*, 395 U. S. 250, 254. In all four of these cases the Court found a *Bruton* error even though the defendants' confessions interlocked.

The plurality's analysis is also inconsistent with almost half of the lower federal and state court opinions relied on in *Bruton* in support of its reasoning. 391 U. S., at 129, 135, and nn. 4, 8, 9. In 6 of the 14 cases cited there, the defendant as well as the codefendant had confessed. See *United States ex rel. Floyd* v. *Wilkins*, 367 F. 2d 990 (CA2 1966); *Greenwell* v. *United States*, 119 U. S. App. D. C. 43, 336 F. 2d 962 (1964); *Barton* v. *United States*, 263 F. 2d 894 (CA5 1959); *United States ex rel. Hill*

Evidence that a defendant has made an "extrajudicial admission of guilt" which "stands before the jury unchallenged," *ante*, at 74, 73, is not an acceptable reason for depriving him of his constitutional right to confront the witnesses against him.[4] In arguing to the contrary, and in striving "to cast the issue" presented "in a . . . broader form" than any of the parties felt necessary to dispose of the case, *ante*, at 72, the plurality necessarily relies on two assumptions. Both are erroneous. First, it assumes that the jury's ability to disregard a codefendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant. Second, it assumes that all unchallenged confessions by a defendant are equally reliable. Aside from two quotations from the dissent in *Bruton*, however, the plurality supports these assumptions with nothing more than the force of its own assertions. But the infinite variability of inculpatory statements (whether made by defendants or codefendants), and of their likely effect on juries, makes those assertions untenable. A hypothetical example is instructive.

Suppose a prosecutor has 10 items of evidence tending to prove that defendant X and codefendant Y are guilty of assassinating a public figure. The first is the tape of a televised interview with Y describing in detail how he and X planned and executed the crime. Items 2 through 9 involve circumstantial evidence of a past association between X and Y, a shared hostility for the victim, and an expressed wish for his early demise—evidence that in itself might very well be insufficient to convict X. Item 10 is the testimony of a drinking partner, a former cellmate, or a divorced spouse of X who vaguely recalls X saying that he had been with Y

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v. *Deegan*, 268 F. Supp. 580 (SDNY 1967); *People* v. *Barbaro*, 395 Ill. 264, 69 N. E. 2d 692 (1946); *People* v. *Fisher*, 249 N. Y. 419, 432, 164 N. E. 336, 341 (1928) (Lehman, J., dissenting).

[4] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

at the approximate time of the killing. Neither X nor Y takes the stand.

If Y's televised confession were placed before the jury while Y was immunized from cross-examination, it would undoubtedly have the "devastating" effect on X that the *Bruton* rule was designed to avoid. 391 U. S., at 128. As MR. JUSTICE STEWART's characteristically concise explanation of the underlying rationale in that case demonstrates, it would also plainly violate X's Sixth Amendment right to confront his accuser.[5] Nevertheless, under the plurality's first remarkable assumption, the prejudice to X—and the violation of his constitutional right—would be entirely cured by the subsequent use of evidence of his own ambiguous statement. In my judgment, such dubious corroboration would enhance, rather than reduce, the danger that the jury would rely on Y's televised confession when evaluating X's guilt. See *United States* v. *Bozza*, 365 F. 2d 206, 215 (CA2 1966) (Friendly, J.), quoted in n. 13, *infra*. Even if I am wrong, however, there is no reason to conclude that the prosecutor's reliance on item 10 would obviate the harm flowing from the use of item 1.

The dubiousness of X's confession in this example—as in any case in which the defendant's inculpatory statement is

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[5] "I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see, *e. g.*, *Pointer* v. *Texas*, 380 U. S. 400; *Douglas* v. *Alabama*, 380 U. S. 415) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. See the Court's opinion, [391 U. S.,] at 136 n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth." 391 U. S., at 137–138 (STEWART, J., concurring).

ambiguous, incomplete, the result of coercive influences, or simply the product of the well-recognized and often untrustworthy "urge to confess" [6]—illustrates the inaccuracy of the plurality's second crucial assumption. It is no doubt true that in some cases a defendant's confession will constitute such convincing evidence of his guilt that the violation of his constitutional rights is harmless beyond a reasonable doubt. *E. g., Brown* v. *United States,* 411 U. S. 223; *Schneble* v. *Florida,* 405 U. S. 427. But in many cases, it is not so convincing. Moreover, such evidence is not inherently more incriminating or more reliable than other kinds of evidence such as fingerprints, photographs, or eyewitness testimony. Yet, if these types of corroboration are given the same absolute effect that the plurality would accord confessions, the *Bruton* rule would almost never apply.[7]

I am also at a loss to understand the relevance of X's failure to "challenge" his confession at trial. *Ante,* at 73. For there is nothing he could say or not say about his own alleged confession that would dispel the dramatically damning effect of Y's. Furthermore, even apart from the general rule that a defendant should not be penalized for exercising one right (in this case the right not to take the stand or to introduce other evidence) by having another taken away (in this case the right to confront one's accuser), *e. g., United States* v. *Jackson,* 390 U. S. 570, it is unclear why X's failure to repudiate it necessarily enhances the reliability of a self-impeaching "confession" such as the one hypothesized above. Cf. *Lakeside* v. *Oregon,* 435 U. S. 333, 343–344 (STEVENS, J., dissenting).

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[6] *E. g.,* Foster, Confessions and the Station House Syndrome, 18 DePaul L. Rev. 683 (1969); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965). See generally T. Reik, The Compulsion to Confess 267 (1959).

[7] Indeed, George Bruton was identified at trial as the perpetrator by an eyewitness to the robbery. App. in *Bruton* v. *United States,* O. T. 1967, No. 705, p. 70.

In short, I see no logic to commend the proposed exception to the rule of *Bruton* save, perhaps, a purpose to limit the effect of that rule to the largely irrelevant set of facts in the case that announced it. If relevant at all in the present context, the factors relied on by the plurality support a proposition no one has even remotely advocated in this case—that the corroborated evidence used in this case was so trustworthy that it should have been fully admissible against all of the defendants, and the jury instructed as much. Conceivably, corroborating or other circumstances surrounding otherwise inadmissible hearsay may so enhance its reliability that its admission in evidence is justified in some situations.[8] But before allowing such a rule to defeat a defendant's fundamental right to confront his accusers, this Court surely should insist upon a strong showing not only of the reliability of the hearsay in the particular case but also of the impossibility, or at least difficulty, of making the accusers available for cross-examination.[9] And, in most cases the prosecution will be hard pressed to make the latter showing in light of its ability to try the defendant and codefendant separately and to afford each immunity from the use against him of his testimony at the other's trial. See *Kastigar* v. *United States*, 406 U. S. 441.

Absent admissibility of the codefendants' confessions against respondents, therefore, the controlling question must be whether it is realistic to assume that the jury followed the judge's instructions to disregard those confessions when it was

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[8] Cf. Fed. Rule Evid. 804 (b)(3) ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement"); *Chambers* v. *Mississippi*, 410 U. S. 284.

[9] See *Berger* v. *California*, 393 U. S. 314; *Barber* v. *Page*, 390 U. S. 719; *Pointer* v. *Texas*, 380 U. S. 400; *Motes* v. *United States*, 178 U. S. 458; Rule 804 (b), *supra* n. 8. See generally Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 582–586, and n. 43 (1978).

evaluating respondents' guilt. The plurality would answer this question affirmatively. But in so doing, it would repudiate much that has been said by the Court and by an impressive array of judicial and scholarly authorities who have addressed the issue.

As the plurality sees it, the answer to this question is supplied by the "crucial assumption underlying [the jury] system . . . that juries will follow the instructions given them by the trial judge." *Ante*, at 73. This assumption, it is argued, has been applied in "numerous decisions of this Court" regarding codefendants' confessions. *Ante*, at 74, and n. 6, citing *Opper* v. *United States*, 348 U. S. 84, and *Blumenthal* v. *United States*, 332 U. S. 539. But this reasoning was advanced just as forcefully in the case that *Bruton* overruled—a case, incidentally, that relied on the same "numerous" decisions that the plurality resurrects in favor of its analysis. See *Delli Paoli* v. *United States*, 352 U. S. 232, 242. What *Bruton* said in response to this reasoning—despite the plurality's contrary assertions, see *ante*, at 70–73—is no less applicable in the present context:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged ac-

> complice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." 391 U. S., at 135–136 (citations and footnotes omitted).

Rather than falling back on once numerous but now discredited decisions, I prefer to stand by the observations about this sort of question by jurists like Felix Frankfurter, Learned Hand,[10] Wiley Rutledge,[11] Robert Jackson,[12] and Henry

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[10] In his dissenting opinion in *Delli Paoli* v. *United States*, 352 U. S. 232, Mr. Justice Frankfurter commented on the recurring difficulties arising in the trial of two or more persons accused of collaborating in a criminal enterprise when incriminating declarations by one or more of the defendants are not admissible against others. He observed:

"The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. While enforcing the rule of admitting the declaration solely against a declarant and admonishing the jury not to consider it against other defendants, Judge Learned Hand, in a series of cases, has recognized the psychological feat that this solution of the dilemma demands of juries. He thus stated the problem:

" 'In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's.' *Nash* v. *United States*, 54 F. 2d 1006, 1007.

". . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Id.*, at 247–248.

[11] Writing for the Court in *Blumenthal* v. *United States*, 332 U. S. 539, 559–560, Mr. Justice Rutledge said:

"The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a

[*Footnote 12 is on p. 90*]

Friendly,[13] and by scholars like Wigmore and Morgan.[14] In my judgment, as I think in theirs, the odds that a jury will obey a command to ignore a codefendant's confession [15]—

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joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants.

"That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible."

[12] Referring to the passage quoted from *Blumenthal* in the preceding footnote, Mr. Justice Jackson made his frequently quoted observation: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States*, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U. S. 440, 453 (concurring opinion).

[13] "Not even appellate judges can be expected to be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called 'a mental gymnastic which is beyond, not only their powers, but anybody's else.' Nash v. United States, 54 F. 2d 1006, 1007 (2 Cir. 1932). It is impossible realistically to suppose that when the twelve good men and women had [the codefendant's]confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks [caused by the redaction of the defendants' names] with the keys [the other evidence] provided and [to] ask himself the intelligent question to what extent Jones' statement supported [that evidence], or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind." *United States* v. *Bozza*, 365 F. 2d 206, 215.

[14] See 8 J. Wigmore, Evidence § 2272, p. 416 (3d ed. 1940); E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 105 (1956).

[15] Indeed, the judge's command to ignore the confession may well assure that any juror who happened to miss the connection to the defendant at first will nonetheless have made it by the time he enters the jury room. *Lakeside* v. *Oregon*, 435 U. S. 333, 345 (STEVENS, J., dissenting).

whether or not the defendant has himself confessed—are no less stacked against the defendant than was the deck of cards that William Douglas used to Robert Wood's, and ultimately to his own, downfall in the game of chance arranged by Woppy Gaddy. In contests like this, the risk that one player may be confused with another is not insubstantial.

I respectfully dissent.

GREAT WESTERN SUGAR CO. *v.* NELSON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-1060. Decided May 29, 1979

Held: Upon dismissing as moot an appeal from the District Court's order requiring arbitration of a dispute as to respondent's discharge by petitioner—the arbitration proceedings having been completed before the appeal could be decided on the merits—the Court of Appeals erred in holding that the District Court's judgment should remain in effect. Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259; *United States* v. *Munsingwear, Inc.*, 340 U. S. 36.

Certiorari granted; vacated and remanded.

PER CURIAM.

Respondent Nelson sued in the United States District Court for the District of Colorado to compel arbitration of his discharge by petitioner Great Western Sugar Co. The District Court held that the presumption of arbitrability consistently applied by the Court of Appeals for the Tenth Circuit required that the dispute be submitted to arbitration. Before petitioner's appeal from the District Court's order could be decided on the merits, the arbitration proceedings had been completed, and respondent filed a suggestion of mootness with the Court of Appeals. The Court of Appeals, in an order and opinion admirable for its conciseness, if not for its fidelity to our case law, said:

> "This matter comes on for consideration of the appellee's suggestion of mootness and motion to vacate judgment of the District Court and to remand the captioned cause with instructions to dismiss. The appellant filed a brief in response arguing that the appeal be allowed to

continue but if not the judgment of the trial court should be reversed and the cause be remanded with directions to dismiss.

"Upon consideration whereof, the order of the Court is as follows:

"1. The appeal is dismissed on the ground of mootness.

"2. The judgment of the trial court is allowed to stand." App. to Pet. for Cert. A5.

In *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936), this Court said:

"Where it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." (Emphasis supplied.)

The course of action prescribed in *Duke Power* has been followed in countless cases in this Court. See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395 (1975); *Parker* v. *Ellis*, 362 U. S. 574 (1960); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).*

Here neither the law nor the facts are in dispute. The Court of Appeals has proceeded on the assumption that the case is moot and has dismissed the appeal for that reason. It has nonetheless stated that the judgment of the District Court shall remain in effect, a statement totally at odds with the holding of *Duke Power*. The reasons for not allowing the District Court judgment to remain in effect when the fact of mootness had been properly called to the attention of the Court of Appeals were fully stated in *United States* v.

**United States* v. *Munsingwear, Inc.*, is perhaps the leading case on the proper disposition of cases that become moot on appeal. There the Court reiterated that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U. S., at 39.

Munsingwear, Inc., supra, at 39–41, and need not be restated here. The Court of Appeals' disposition of this case may have been the result of a desire to show approval of the reasoning of the District Court in directing arbitration, but that motive cannot be allowed to excuse its failure to follow the teaching of *Duke Power Co., supra.*

Because the fact of mootness is clear, and indeed is relied upon by the Court of Appeals as its reason for dismissing petitioner's appeal, and because the law as laid down by this Court in *Duke Power Co., supra,* and *United States* v. *Munsingwear, Inc., supra,* is equally clear, the petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals with directions to vacate the District Court's judgment and to remand the case for dismissal of respondent's complaint.

It is so ordered.

MR. JUSTICE STEVENS, dissenting.

If we have time to grant certiorari for the sole purpose of correcting a highly technical and totally harmless error, one might reasonably (but incorrectly) infer that we have more than enough time to dispatch our more important business.

I would deny the petition for a writ of certiorari.

GREEN *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 78-5944. Decided May 29, 1979

Petitioner, who was indicted with one Moore for rape and murder, was tried separately in a Georgia state court. After the jury determined that petitioner was guilty of murder, a second proceeding was held to decide whether capital punishment would be imposed, and petitioner attempted to introduce the testimony of a third person, who had testified for the State at Moore's earlier trial (wherein Moore was convicted of both crimes and sentenced to death), to the effect that Moore had confided to the witness that Moore had killed the victim, shooting her twice after ordering petitioner to run an errand. The trial court refused to admit the testimony, ruling that it constituted inadmissible hearsay under Georgia law. The petitioner was sentenced to death, and the Georgia Supreme Court upheld the conviction and sentence.

Held: Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment, denying petitioner a fair trial on the issue of punishment and thus requiring that the sentence be vacated. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons existed to assume its reliability. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore and to base a death sentence upon it.

Certiorari granted; 242 Ga. 261, 249 S. E. 2d 1, reversed and remanded.

PER CURIAM.

Petitioner and Carzell Moore were indicted together for the rape and murder of Teresa Carol Allen. Moore was tried separately, was convicted of both crimes, and has been sentenced to death. See *Moore* v. *State*, 240 Ga. 807, 243 S. E. 2d 1, cert. denied, 439 U. S. 903 (1978). Petitioner subsequently was convicted of murder, and also received a capital sentence. The Supreme Court of Georgia upheld the conviction and sentence, 242 Ga. 261, 249 S. E. 2d 1 (1978), and

petitioner has sought review of so much of the judgment as affirmed the capital sentence. We grant the motion for leave to proceed *in forma pauperis* and the petition for certiorari and vacate the sentence.

The evidence at trial tended to show that petitioner and Moore abducted Allen from the store where she was working alone and, acting either in concert or separately, raped and murdered her. After the jury determined that petitioner was guilty of murder, a second trial was held to decide whether capital punishment would be imposed. See Ga. Code § 27–2503 (1978). At this second proceeding, petitioner sought to prove he was not present when Allen was killed and had not participated in her death. He attempted to introduce the testimony of Thomas Pasby, who had testified for the State at Moore's trial. According to Pasby, Moore had confided to him that he had killed Allen, shooting her twice after ordering petitioner to run an errand. The trial court refused to allow introduction of this evidence, ruling that Pasby's testimony constituted hearsay that was inadmissible under Ga. Code § 38–301 (1978).[1] The State then argued to the jury that in the absence of direct evidence as to the circumstances of the crime, it could infer that petitioner participated directly in Allen's murder from the fact that more than one bullet was fired into her body.[2]

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[1] Georgia recognizes an exception to the hearsay rule for declarations against pecuniary interest, but not for declarations against penal interest. See 242 Ga. 261, 269–272, 249 S. E. 2d 1, 8–9 (1978), quoting *Little* v. *Stynchcombe*, 227 Ga. 311, 180 S. E. 2d 541 (1971).

[2] The District Attorney stated to the jury:

"We couldn't possibly bring any evidence other than the circumstantial evidence and the direct evidence that we had pointing to who did it, and I think it's especially significant for you to remember what Dr. Dawson said in this case. When the first shot, in his medical opinion, he stated that Miss Allen had positive blood pressure when both shots were fired but I don't know whether Carzell Moore fired the first shot and handed the gun to Roosevelt Green and he fired the second shot or whether it was vice versa or whether Roosevelt Green had the gun and fired the shot or

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (plurality opinion); *id.*, at 613–616 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.[3] In these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973).[4] Because the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, adhering to their view that the death penalty is in all circum-

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Carzell Moore had the gun and fired the first shot or the second, but I think it can be reasonably stated that you Ladies and Gentlemen can believe that each one of them fired the shots so that they would be as equally involved and one did not exceed the other's part in the commission of this crime." Pet. for Cert. 10.

[3] A confession to a crime is not considered hearsay under Georgia law when admitted against a declarant. Ga. Code § 38–414 (1978); *Green* v. *State*, 115 Ga. App. 685, 155 S. E. 2d 655 (1967).

[4] See Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 592–593 (1978).

stances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), would vacate the death sentence without remanding for further proceedings.

MR. JUSTICE REHNQUIST, dissenting.

The Court today takes another step toward embalming the law of evidence in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. I think it impossible to find any justification in the Constitution for today's ruling, and take comfort only from the fact that since this is a capital case, it is perhaps an example of the maxim that "hard cases make bad law."

The Georgia trial court refused to allow in evidence certain testimony at petitioner's sentencing trial on the ground that it constituted inadmissible hearsay under Ga. Code § 38–301 (1978). This Court does not, and could not, dispute the propriety of that ruling. Instead, it marshals a number of ad hoc reasons why Georgia should adopt a code of evidence that would allow this particular testimony to be admitted, and concludes that "[i]n these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" *Ante*, at 97.

Nothing in the United States Constitution gives this Court any authority to supersede a State's code of evidence because its application in a particular situation would defeat what this Court conceives to be "the ends of justice." The Court does not disagree that the testimony at issue is hearsay or that it fails to come within any of the exceptions to the hearsay rule provided by Georgia's rules of evidence. The Court obviously is troubled by the fact that the same testimony was admissible at the separate trial of petitioner's codefendant at the behest of the State. But this fact by no means demonstrates that the Georgia courts have not evenhandedly applied their code of evidence, with its various hearsay exceptions, so as to deny

petitioner a fair trial. No practicing lawyer can have failed to note that Georgia's evidentiary rules, like those of every other State and of the United States, are such that certain items of evidence may be introduced by one party, but not by another. This is a fact of trial life, embodied throughout the hearsay rule and its exceptions. This being the case, the United States Constitution must be strained to or beyond the breaking point to conclude that all capital defendants who are unable to introduce all of the evidence which they seek to admit are denied a fair trial. I therefore dissent from the vacation of petitioner's sentence.

DUNN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 77-6949. Argued March 28, 1979—Decided June 4, 1979

Petitioner's testimony before a grand jury in June 1976 implicated one Musgrave in various drug-related offenses, and an indictment of Musgrave followed. On September 30, 1976, petitioner recanted his testimony in an oral statement made under oath in the office of Musgrave's attorney. Musgrave then moved to dismiss his indictment, alleging that it was based on perjured testimony. At an evidentiary hearing on this motion on October 21, 1976, petitioner adopted his September 30 statement and testified that only a small part of his grand jury testimony was true. As a result, the charges against Musgrave were reduced. Petitioner was subsequently indicted for violations of 18 U. S. C. § 1623 (1976 ed., Supp. I), which prohibits false declarations made under oath "in any proceeding before or ancillary to any court or grand jury." The indictment charged that petitioner's grand jury testimony was inconsistent with statements made "on September 30, 1976, while under oath as a witness in a proceeding ancillary to" the Musgrave prosecution. At trial, the Government introduced, over petitioner's objection, pertinent parts of his grand jury testimony, his testimony at the evidentiary hearing, and his sworn statement to Musgrave's attorney. Petitioner was convicted, and the Court of Appeals affirmed. Although it agreed with petitioner that the September interview in the attorney's office was not an ancilliary proceeding under § 1623, the court concluded that the October 21 hearing was such a proceeding. While acknowledging that the indictment specified the September 30 interview rather than the October 21 hearing as the ancillary proceeding, the court construed this discrepancy as a nonprejudicial variance between the indictment and the proof at trial.

Held:

1. Since the indictment and jury instructions specified the September 30 interview as the ancillary proceeding, the Court of Appeals erred in predicating its affirmance on petitioner's October 21 testimony. To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury offends the most basic notions of due process. Although the jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting

his September 30 statement rather than on the latter statement itself, the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. Pp. 105–107.

2. As both the language and legislative history of Title IV of the 1970 Organized Crime Control Act make clear, an interview in a private attorney's office at which a sworn statement is given does not constitute a "proceeding ancillary to a court or grand jury" within the meaning of § 1623. Moreover, to characterize such an interview as an ancillary proceeding would contravene the long-established practice of resolving doubt concerning the ambit of criminal statutes in favor of lenity. Pp. 107–113.

577 F. 2d 119, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Daniel J. Sears, by appointment of the Court, 439 U. S. 1064, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, William C. Bryson, Sidney M. Glazer,* and *Kathleen A. Felton.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Title IV of the Organized Crime Control Act of 1970, 18 U. S. C. § 1623 (1976 ed., Supp. I), prohibits false declarations made under oath "in any proceeding before or ancillary to any court or grand jury of the United States." [1] This case turns

[1] In pertinent part, 18 U. S. C. § 1623 (1976 ed., Supp. I) provides:

"(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the

on the scope of the term ancillary proceeding in § 1623, a phrase not defined in that provision or elsewhere in the Criminal Code. More specifically, we must determine whether an interview in a private attorney's office at which a sworn statement is given constitutes a proceeding ancillary to a court or grand jury within the meaning of the statute.

I

On June 16, 1976, petitioner Robert Dunn testified before a federal grand jury under a grant of immunity pursuant to 18 U. S. C. § 6002.[2] The grand jury was investigating illicit

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same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

. . . . .

"(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

"(1) each declaration was material to the point in question, and

"(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

"In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true."

[2] Under 18 U. S. C. § 6002:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness

drug activity at the Colorado State Penitentiary where petitioner had been incarcerated. Dunn's testimony implicated a fellow inmate, Phillip Musgrave, in various drug-related offenses. Following petitioner's appearance, the grand jury indicted Musgrave for conspiracy to manufacture and distribute methamphetamine.

Several months later, on September 30, 1976, Dunn arrived without counsel in the office of Musgrave's attorney, Michael Canges. In the presence of Canges and a notary public, petitioner made an oral statement under oath in which he recanted his grand jury testimony implicating Musgrave. Canges subsequently moved to dismiss the indictment against Musgrave, alleging that it was based on perjured testimony. In support of this motion, the attorney submitted a transcript of Dunn's September 30 statement.

The District Court held an evidentiary hearing on Musgrave's motion to dismiss on October 21, 1976. At that hearing, petitioner, who was then represented by counsel, adopted the statement he had given in Canges' office and testified that only a small part of what he had told the grand jury was in fact true. App. 46. As a result of petitioner's testimony, the Government reduced the charges against Musgrave to misdemeanor possession of methamphetamine. See 21 U. S. C. § 844.

Petitioner was subsequently indicted on five counts of making false declarations in violation of 18 U. S. C. § 1623 (1976 ed., Supp. I). The indictment charged that Dunn's testimony before the grand jury was inconsistent with statements made "on September 30, 1976, while under oath as a witness

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an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

in a proceeding ancillary to *United States* v. *Musgrave*, . . . to the degree that one of said declarations was false . . . ." App. 5–6.[3] In response to petitioner's motion for a bill of particulars, the Government indicated that it would rely on the "inconsistent declarations" method of proof authorized by § 1623 (c). Under that subsection, the Government must establish the materiality and inconsistency of declarations made in proceedings before or ancillary to a court or grand jury, but need not prove which of the declarations is false. See n. 1, *supra*.

At trial, the Government introduced over objection pertinent parts of Dunn's grand jury testimony, his testimony at the October 21 evidentiary hearing, and his sworn statement to Musgrave's attorney. After the Government rested its case, petitioner renewed his objections in a motion for acquittal. He contended that the September 30 statement was not made in a proceeding ancillary to a federal court or grand jury as required by § 1623 (c). In addition, Dunn argued that use of his grand jury testimony to prove an inconsistent declaration would contravene the Government's promise of immunity, in violation of 18 U. S. C. § 6002 and the Fifth Amendment. The court denied the motion and submitted the case to the jury. Petitioner was convicted on three of the five counts of the indictment and sentenced to concurrent 5-year terms on each count.

The Court of Appeals for the Tenth Circuit affirmed. 577 F. 2d 119 (1978). Although it agreed with petitioner that the interview in Canges' office was not an ancillary proceeding under § 1623, the court determined that the October 21 hearing at which petitioner adopted his September statement was a proceeding ancillary to a grand jury investigation. 577 F. 2d, at 123. Acknowledging that the indictment specified the September 30 interview rather than the October 21 hear-

[3] Each count alleged that a specific representation in the September 30 statement was inconsistent with a corresponding portion of petitioner's grand jury testimony. See App. 3–11.

ing as the ancillary proceeding, the Court of Appeals construed this discrepancy as a nonprejudicial variance between the indictment and proof at trial. *Id.*, at 123–124. The court also upheld the use of petitioner's immunized grand jury testimony to prove a § 1623 violation. In so ruling, the court stated that immunized testimony generally may not be used to establish an inconsistent declaration without a prior independent showing that the testimony is false. But, in the court's view, petitioner's unequivocal concession at the October hearing that he had testified falsely before the grand jury justified the Government's reliance on that testimony. 577 F. 2d, at 125–126.

We granted certiorari, 439 U. S. 1045 (1978). Because we disagree with the Court of Appeals' ultimate disposition of the ancillary-proceeding issue, we reverse without reaching the question whether petitioner's immunized testimony was admissible to prove a violation of § 1623.

II

A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment. *Berger* v. *United States*, 295 U. S. 78 (1935). In the instant case, since the indictment specified the September 30 interview rather than the October 21 hearing as the ancillary proceeding, the Court of Appeals identified a variance between the pleadings and the Government's proof at trial. However, reasoning that petitioner's October 21 testimony was "inextricably related" to his September 30 declaration, the court concluded that petitioner could have anticipated that the prosecution would introduce the October testimony. 577 F. 2d, at 123. The court therefore determined that the variance was not fatal to the Government's case. See *Kotteakos* v. *United States*, 328 U. S. 750, 757 (1946).

In our view, it is unnecessary to inquire, as did the Court of Appeals, whether petitioner was prejudiced by a variance

between what was alleged in the indictment and what was proved at trial. For we discern no such variance. The indictment charged inconsistency between petitioner's statements in the September 30 interview and his grand jury testimony. That was also the theory on which the case was tried and submitted to the jury.[4] Indeed, the October 21 testimony was introduced by the Government only in rebuttal to dispel any inference that petitioner's grand jury testimony was true. See Tr. 82–83. But while there was no variance between the indictment and proof at trial, there was a discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained petitioner's conviction. Whereas the jury was instructed to rest its decision on Dunn's September statement, the Tenth Circuit predicated its affirmance on petitioner's October testimony. The Government concedes that this ruling was erroneous. Brief for United States 15, 35; Tr. of Oral Arg. 25. We agree.

To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See *Eaton* v. *Tulsa*, 415 U. S. 697, 698–699 (1974) (*per curiam*); *Garner* v. *Louisiana*, 368 U. S. 157, 163–164 (1961); *Cole* v. *Arkansas*, 333 U. S. 196, 201 (1948); *De Jonge* v.

[4] The District Court instructed the jury that in order to convict petitioner, it had to determine beyond a reasonable doubt that petitioner "while under oath, made irreconcilably contradictory declarations . . . in any proceeding before or ancillary to a court or grand jury." Tr. 179. The court did not define the term ancillary proceeding, but admonished the jury to render its verdict on the charges alleged in the indictment, which specified June 16, 1976, and September 30, 1976, as the proceedings at which inconsistent statements were given. *Id.*, at 175–176; App. 3–11. Moreover, both the Assistant United States Attorney and defense counsel focused their summations on the September 30 statement. See Tr. 151, 167.

Oregon, 299 U. S. 353, 362 (1937). There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in *Cole* v. *Arkansas*, *supra*, at 201, "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Thus, unless the September 30 interview constituted an ancillary proceeding, petitioner's conviction cannot stand.

III

Congress enacted § 1623 as part of the 1970 Organized Crime Control Act, Pub. L. 91–452, 84 Stat. 922, to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries. S. Rep. No. 91–617, pp. 58–59 (1969). Invoking this broad congressional purpose, the Government argues for an expansive construction of the term ancillary proceeding. Under the Government's analysis, false swearing in an affidavit poses the same threat to the factfinding process as false testimony in open court. Brief for United States 21. Thus, the Government contends that any statements made under oath for submission to a court, whether given in an attorney's office or in a local bar and grill, fall within the ambit of § 1623. See Tr. of Oral Arg. 31. In our judgment, the term "proceeding," which carries a somewhat more formal connotation, suggests that Congress had a narrower end in view when enacting § 1623. And the legislative history of the Organized Crime Contol Act confirms that conclusion.

Section 1623 was a response to perceived evidentiary problems in demonstrating perjury under the existing federal statute, 18 U. S. C. § 1621.[5] As Congress noted, the strict common-law requirements for establishing falsity which had been engrafted onto the federal perjury statute often made prosecution for false statements exceptionally difficult.[6] By relieving the Government of the burden of proving which of two or more inconsistent declarations was false, see § 1623 (c), Congress sought to afford "greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth." S. Rep. No. 91–617, p. 59 (1969). But nothing in the language or legislative history of the statute suggests that Congress contemplated a relaxation of the Government's burden of proof with respect to all inconsistent statements given under oath. Had Congress intended such a result, it presumably would have drafted § 1623 to encompass all sworn declarations irrespective of whether they were made in pro-

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[5] Title 18 U. S. C. § 1621 provides:

"Whoever—

"(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

"(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

"is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

[6] In particular, Congress focused on the two-witness rule, under which "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused." *Hammer* v. *United States*, 271 U. S. 620, 626 (1926); accord, *Weiler* v. *United States*, 323 U. S. 606, 608–610 (1945). See S. Rep. No. 91–617, pp. 57–59 (1969).

ceedings before or ancillary to a court or grand jury. Particularly since Congress was aware that statements under oath were embraced by the federal perjury statute without regard to where they were given,[7] the choice of less comprehensive language in § 1623 does not appear inadvertent.

That Congress intended § 1623 to sweep less broadly than the perjury statute is also apparent from the origin of the term ancillary proceeding. As initially introduced in Congress, the Organized Crime Control Act contained a version of § 1623 which encompassed only inconsistent statements made in any "trial, hearing, or proceeding before any court or grand jury."[8] When asked to comment on the proposed statute, the Department of Justice noted that the scope of the inconsistent declarations provision was "not as inclusive" as the perjury statute. See Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 372 (1969) (hereinafter S. 30 Hearings). Significantly, the Justice Department did not suggest that the provision be made coextensive with the perjury statute. However, in subsequent Senate Subcommittee hearings, Assistant Attorney General Wilson indicated, without elaboration, that the Department advocated "including [under § 1623] other testimony, preliminary testimony and other statements, in the perjury field." *Id.*, at 389.

In response to that general suggestion, Senator McClellan,

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[7] See *id.*, at 110–111; n. 5, *supra*.

[8] In its entirety, the original version of § 1623 (a) provided:

"Whoever, having taken an oath in any trial, hearing, or proceeding before any court or grand jury, in which a law of the United States authorizes the oath, knowingly falsifies fact, or makes any false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." S. 30, 91st Cong., 1st Sess., § 401 (1969).

on behalf of the Subcommittee, sent a letter to the Assistant Attorney General clarifying its purpose:

> "You also read Title IV not to cover 'pre-trial depositions, affidavits and certifications.' This was not our intent in drafting the bill. We had hoped that it would be applicable, for example, to situations such as [the] kind of pre-trial depositions that the enforcement of S. 1861 would present. If we included in the statute the phrase 'proceedings before or ancillary to any court or grand jury,' do you feel that this intent would be adequately expressed?" *Id.*, at 409.[9]

The Government attaches great significance to the qualification, "for example," in Senator McClellan's letter. Because pretrial depositions were mentioned as illustrative, the Government interprets the term ancillary proceeding to subsume affidavits and certifications as well. But that is not the inference the Department of Justice originally drew from the Senator's letter. Responding to the proposed modification of § 1623, Assistant Attorney General Wilson did not advert to affidavits or certifications but stated only that

> "[i]nclusion of the phrase 'proceedings before or ancillary to any court or grand jury' in the false statement provision would in our opinion adequately bring within the coverage of the provision pre-trial depositions such as that contained in S. 1861." S. 30 Hearings 411.

In our view, the Justice Department's contemporaneous rather than its current interpretation offers the more plausible reading of the Subcommittee's intent. Its attention having been drawn to the issue, had the Subcommittee wished to bring all affidavits and certifications within the statutory

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[9] The provision of S. 1861 to which the Senator adverted involved use of depositions in racketeering investigations. It is currently codified as 18 U. S. C. § 1968.

prohibition, Senator McClellan presumably would have so stated.

Finally, to construe the term ancillary proceeding in § 1623 as excluding statements given in less formal contexts than depositions would comport with Congress' use of the phrase in a related provision of the Organized Crime Control Act. Title II of the Act, 18 U. S. C. § 6002, authorizes extension of immunity to any witness who claims his privilege against self-incrimination "in a proceeding . . . ancillary to" a court, grand jury, or agency of the United States, or before Congress or one of its committees. See n. 2, *supra*. Although neither the House nor Senate Report defines the precise scope of § 6002, they both specify pretrial depositions as the sole example of what would constitute an ancillary proceeding under that provision. H. R. Rep. No. 91–1549, p. 42 (1970); S. Rep. No. 91–617, p. 145 (1969).

Thus, both the language and history of the Act support the Court of Appeals' conclusion that petitioner's September 30 interview "lack[ed] the degree of formality" required by § 1623. 577 F. 2d, at 123.[10] For the Government does not and could not seriously maintain that the interview in Canges' office constituted a deposition. See Tr. of Oral Arg.

[10] In arguing that petitioner's September 30 interview was an ancillary proceeding, the Government relies on *United States* v. *Stassi*, 583 F. 2d 122 (CA3 1978), and *United States* v. *Krogh*, 366 F. Supp. 1255, 1256 (DC 1973). The defendant in *Stassi* was convicted under § 1623 of making statements in a Fed. Rule Crim. Proc. 11 guilty plea hearing that were irreconcilable with his declarations in an affidavit supporting a motion to vacate sentence. Without adverting to any legislative history, the Court of Appeals affirmed on the theory that a false affidavit "offends the administration of criminal justice as much as [other] false material declaration[s]." 583 F. 2d, at 127. Insofar as *Stassi*'s analysis is inconsistent with our decision here, we decline to follow it. And *Krogh* affords no support for the Government's position in this case since the court there held only that a sworn deposition taken in the office of an Assistant United States Attorney General was a proceeding ancillary to a grand jury investigation.

25. Musgrave's counsel made no attempt to comply with the procedural safeguards for depositions set forth in Fed. Rule Crim. Proc. 15 and 18 U. S. C. § 3503. A court order authorizing the deposition was never obtained.[11] Nor did petitioner receive formal notice of the proceeding or of his right to have counsel present.[12] Indeed, petitioner did not even certify the transcript of the interview as accurate.[13]

To characterize such an interview as an ancillary proceeding would not only take liberties with the language and legislative history of § 1623, it would also contravene this Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity. *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974); *Rewis* v. *United States*, 401 U. S. 808, 812 (1971); *Bell* v. *United States*, 349 U. S. 81, 83 (1955). This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972); *United States* v. *Harriss*, 347 U. S. 612, 617 (1954); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939); *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931). Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions

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[11] Title 18 U. S. C. § 3503 (a) provides:

"Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition . . . ."

The language of Fed. Rule Crim. Proc. 15 (a) is substantially the same.

[12] See 18 U. S. C. §§ 3503 (b), (c); Fed. Rule Crim. Proc. 15 (b).

[13] See App. 46; 18 U. S. C. § 3503 (d); Fed. Rule Crim Proc. 15 (d).

that are not "'plainly and unmistakably'" proscribed. *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917).

We cannot conclude here that Congress in fact intended or clearly expressed an intent that § 1623 should encompass statements made in contexts less formal than a deposition. Accordingly, we hold that petitioner's September 30 declarations were not given in a proceeding ancillary to a court or grand jury within the meaning of the statute.[14]

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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[14] The Government points out that if this Court reverses petitioner's conviction on the ground that the September 30 statement was not given in an ancillary proceeding, petitioner will be subject to reindictment for making declarations in the October 21 hearing inconsistent with his testimony in the June 16 grand jury proceeding. Thus, the Government urges us to reach the second question decided by the Court of Appeals concerning the use of petitioner's immunized testimony to prove a violation of § 1623. Brief for United States 36–37. We decline to render an advisory opinion based on the Government's suppositions not only that petitioner will be reindicted but also that he will be convicted after a trial at which the immunized testimony is introduced.

UNITED STATES *v.* BATCHELDER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-776. Argued April 18, 1979—Decided June 4, 1979

Respondent was found guilty of violating 18 U. S. C. § 922 (h), which is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 (Act). That provision prohibits previously convicted felons from receiving a firearm that has traveled in interstate commerce. The District Court sentenced respondent under 18 U. S. C. § 924 (a) to five years' imprisonment, the maximum term authorized for violation of § 922 (h). The Court of Appeals affirmed the conviction but remanded for resentencing. Noting that the substantive elements of § 922 (h) and 18 U. S. C. App. § 1202 (a), which is contained in Title VII of the Act, are identical as applied to a convicted felon who unlawfully receives a firearm, the court interpreted the Act to allow no more than the 2-year maximum sentence provided by § 1202 (a).

Held: A defendant convicted of violating § 922 (h) is properly sentenced under § 924 (a) even though his conduct also violates § 1202 (a). Pp. 118–126.

(a) Nothing in the language, structure, or legislative history of the Act suggests that because of the overlap between §§ 922 (h) and 1202 (a), a defendant convicted under § 922 (h) may be imprisoned for no more than the maximum term specified in § 1202 (a). Rather, each substantive statute, in conjunction with its own sentencing provision, operates independently of the other. Pp. 118–121.

(b) The Court of Appeals erroneously relied on three principles of statutory interpretation in construing § 1202 (a) to override the penalties authorized by § 924 (a). The doctrine that ambiguities in criminal statutes must be resolved in favor of lenity is not applicable here since there is no ambiguity to resolve. Nor can § 1202 (a) be interpreted as implicitly repealing § 924 (a) whenever a defendant's conduct might violate both sections. Legislative intent to repeal must be manifest in the "'positive repugnancy between the provisions.'" *United States* v. *Borden Co.*, 308 U. S. 188, 199. In this case, the penalty provisions are fully capable of coexisting because they apply to convictions under different statutes. Finally, the maxim that statutes should be construed to avoid constitutional questions offers no assistance here, since this principle applies only when an alternative interpretation is fairly possible from the language of the statute. There is simply no basis in

the Act for reading the term "five" in § 924 (a) to mean "two." Pp. 121–122.

(c) The statutory provisions at issue are not void for vagueness because they unambiguously specify the activity proscribed and the penalties available upon conviction. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. P. 123.

(d) Nor are the statutes unconstitutional under the equal protection component or Due Process Clause of the Fifth Amendment on the theory that they allow the prosecutor unfettered discretion in selecting which of two penalties to apply. A prosecutor's discretion to choose between §§ 922 (h) and 1202 (a) is not "unfettered"; selectivity in the enforcement of criminal laws is subject to constitutional constraints. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced. Pp. 123–125.

(e) The statutes are not unconstitutional as impermissibly delegating to the Executive Branch the Legislature's responsibility to fix criminal penalties. Having clearly informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each statute, Congress has fulfilled its duty. Pp. 125–126.

581 F. 2d 626, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Andrew J. Levander argued the cause for the United States *pro hac vice*. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey, Sidney Glazer,* and *Frank J. Marine.*

Charles A. Bellows argued the cause for respondent. With him on the brief were *Jason E. Bellows* and *Carole K. Bellows.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case are two overlapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968 (Omni-

bus Act).[1] Both prohibit convicted felons from receiving firearms, but each authorizes different maximum penalties. We must determine whether a defendant convicted of the offense carrying the greater penalty may be sentenced only under the more lenient provision when his conduct violates both statutes.

I

Respondent, a previously convicted felon, was found guilty of receiving a firearm that had traveled in interstate commerce, in violation of 18 U. S. C. § 922 (h).[2] The District Court sentenced him under 18 U. S. C. § 924 (a) to five years' imprisonment, the maximum term authorized for violation of § 922 (h).[3]

The Court of Appeals affirmed the conviction but, by a divided vote, remanded for resentencing. 581 F. 2d 626 (CA7 1978). The majority recognized that respondent had been indicted and convicted under § 922 (h) and that § 924 (a) permits five years' imprisonment for such violations. 581 F. 2d, at 629. However, noting that the substantive elements

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[1] 82 Stat. 197.

[2] In pertinent part, 18 U. S. C. § 922 (h) provides:

"It shall be unlawful for any person—

"(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

"(2) who is a fugitive from justice;

"(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug . . . or narcotic drug . . . ; or

"(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

"to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

[3] Title 18 U. S. C. § 924 (a) provides in relevant part:

"Whoever violates any provision of this chapter . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

of § 922 (h) and 18 U. S. C. App. § 1202 (a) are identical as applied to a convicted felon who unlawfully receives a firearm, the court interpreted the Omnibus Act to allow no more than the 2-year maximum sentence provided by § 1202 (a). 581 F. 2d, at 629.[4] In so holding, the Court of Appeals relied on three principles of statutory construction. Because, in its view, the "arguably contradict[ory]" penalty provisions for similar conduct and the "inconclusive" legislative history raised doubt whether Congress had intended the two penalty provisions to coexist, the court first applied the doctrine that ambiguities in criminal legislation are to be resolved in favor of the defendant. *Id.*, at 630. Second, the court determined that since § 1202 (a) was "Congress' last word on the issue of penalty," it may have implicitly repealed the punishment provisions of § 924 (a). 581 F. 2d, at 630. Acknowledging that the "first two principles cannot be applied to these facts without some difficulty," the majority also invoked the maxim that a court should, if possible, interpret a statute to avoid constitutional questions. *Id.*, at 630–631. Here, the court reasoned, the "prosecutor's power to select one of two statutes that are identical except for their penalty provisions" implicated "important constitutional protections." *Id.*, at 631.

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[4] Section 1202 (a) states:

"Any person who—

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

"(2) has been discharged from the Armed Forces under dishonorable conditions, or

"(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

"(4) having been a citizen of the United States has renounced his citizenship, or

"(5) being an alien is illegally or unlawfully in the United States,

"and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both." 18 U. S. C. App. § 1202 (a).

The dissent found no basis in the Omnibus Act or its legislative history for engrafting the penalty provisions of § 1202 (a) onto §§ 922 (h) and 924 (a). 581 F. 2d, at 638–639. Relying on "the long line of cases . . . which hold that where an act may violate more than one criminal statute, the government may elect to prosecute under either, even if [the] defendant risks the harsher penalty, so long as the prosecutor does not discriminate against any class of defendants," the dissent further concluded that the statutory scheme was constitutional. *Id.*, at 637.

We granted certiorari, 439 U. S. 1066 (1979), and now reverse the judgment vacating respondent's 5-year prison sentence.

II

This Court has previously noted the partial redundancy of §§ 922 (h) and 1202 (a), both as to the conduct they proscribe and the individuals they reach. See *United States* v. *Bass*, 404 U. S. 336, 341–343, and n. 9 (1971). However, we find nothing in the language, structure, or legislative history of the Omnibus Act to suggest that because of this overlap, a defendant convicted under § 922 (h) may be imprisoned for no more than the maximum term specified in § 1202 (a). As we read the Act, each substantive statute, in conjunction with its own sentencing provision, operates independently of the other.

Section 922 (h), contained in Title IV of the Omnibus Act, prohibits four categories of individuals from receiving "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." See n. 2, *supra*. Persons who violate Title IV are subject to the penalties provided by § 924 (a), which authorizes a maximum fine of $5,000 and imprisonment for up to five years. See n. 3, *supra*. Section 1202 (a), located in Title VII of the Omnibus Act, forbids five categories of individuals from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm." This same section authorizes a maximum fine of

$10,000 and imprisonment for not more than two years. See n. 4, *supra*.

While §§ 922 and 1202 (a) both prohibit convicted felons such as petitioner from receiving firearms,[5] each Title unambiguously specifies the penalties available to enforce its substantive proscriptions. Section 924 (a) applies without exception to "[w]hoever violates any provision" of Title IV, and § 922 (h) is patently such a provision. See 18 U. S. C., ch. 44; 82 Stat. 226, 234; S. Rep. No. 1097, 90th Cong., 2d Sess., 20–25, 117 (1968). Similarly, because Title VII's substantive prohibitions and penalties are both enumerated in § 1202, its penalty scheme encompasses only criminal prosecutions brought under that provision. On their face, these statutes thus establish that § 924 (a) alone delimits the appropriate punishment for violations of § 922 (h).

That Congress intended to enact two independent gun control statutes, each fully enforceable on its own terms, is confirmed by the legislative history of the Omnibus Act. Section 922 (h) derived from § 2 (f) of the Federal Firearms Act of

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[5] Even in the case of convicted felons, however, the two statutes are not coextensive. For example, Title VII defines a felony as

"any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less." 18 U. S. C. App. § 1202 (c) (2).

Under Title IV, "a crime punishable by imprisonment for a term exceeding one year," 18 U. S. C. § 922 (h) (1), excludes

"(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . , or

"(B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U. S. C. § 921 (a) (20).

In addition, the Commerce Clause elements of §§ 922 (h) and 1202 (a) may vary slightly. See *Barrett* v. *United States*, 423 U. S. 212 (1976); *Scarborough* v. *United States*, 431 U. S. 563, 571–572 (1977).

1938, 52 Stat. 1251, and § 5 of that Act, 52 Stat. 1252, authorized the same maximum prison term as § 924 (a). Title IV of the Omnibus Act merely recodified with some modification this "carefully constructed package of gun control legislation," which had been in existence for many years. *Scarborough* v. *United States*, 431 U. S. 563, 570 (1977); see *United States* v. *Bass*, *supra*, at 343 n. 10; 15 U. S. C. §§ 902, 905 (1964 ed.).

By contrast, Title VII was a "last-minute" floor amendment, "hastily passed, with little discussion, no hearings, and no report." *United States* v. *Bass*, *supra*, at 344, and n. 11; see *Scarborough* v. *United States*, *supra*, at 569–570, and n. 9. And the meager legislative debates involving that amendment demonstrate no intention to alter the terms of Title IV. Immediately before the Senate passed Title VII, Senator Dodd inquired whether it would substitute for Title IV. 114 Cong. Rec. 14774 (1968). Senator Long, the sponsor of the amendment, replied that § 1202 would "take nothing from" but merely "add to" Title IV. 114 Cong. Rec. 14774 (1968). Similarly, although Title VII received only passing mention in House discussions of the bill, Representative Machen made clear that the amendment would "complement . . . the gun-control legislation contained in title IV." *Id.*, at 16286. Had these legislators intended to pre-empt Title IV in cases of overlap, they presumably would not have indicated that the purpose of Title VII was to complement Title IV. See *Scarborough* v. *United States*, *supra*, at 573.[6]

[6] Four months after enacting the Omnibus Act, the same Congress amended and re-enacted Titles IV and VII as part of the Gun Control Act of 1968. 82 Stat. 1213. This latter Act also treats the provisions of Titles IV and VII as independent and self-contained. Title I of the Gun Control Act amended Title IV, compare 82 Stat. 225 with 82 Stat. 1214, and Title III of the Gun Control Act amended Title VII. Compare 82 Stat. 236 with 82 Stat. 1236. The accompanying legislative Reports nowhere indicate that the sentencing scheme of § 1202 (a) was to govern convictions under § 922. See H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 31, 34 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess., 21, 37 (1968).

These discussions, together with the language and structure of the Omnibus Act, evince Congress' clear understanding that the two Titles would be applied independently.[7]

In construing § 1202 (a) to override the penalties authorized by § 924 (a), the Court of Appeals relied, we believe erroneously, on three principles of statutory interpretation. First, the court invoked the well-established doctrine that ambiguities in criminal statutes must be resolved in favor of lenity. *E. g., Rewis* v. *United States,* 401 U. S. 808, 812 (1971); *United States* v. *Bass,* 404 U. S., at 347; *United States* v. *Culbert,* 435 U. S. 371, 379 (1978); *United States* v. *Naftalin,* 441 U. S. 768, 778–779 (1979); *Dunn* v. *United States, ante,* at 112–113. Although this principle of construction applies to sentencing as well as substantive provisions, see *Simpson* v. *United States,* 435 U. S. 6, 14–15 (1978), in the instant case there is no ambiguity to resolve. Respondent unquestionably violated § 922 (h), and § 924 (a) unquestionably permits five years' imprisonment for such a violation. That § 1202 (a) provides different penalties for essentially the same conduct is no justification for taking liberties with unequivocal stat-

[7] The anomalies created by the Court of Appeals' decision further suggest that Congress must have intended only the penalties specified in § 924 (a) to apply to violations of § 922 (h). For example, a person who received a firearm while under indictment for murder would be subject to five years' imprisonment, since only § 922 (h) includes those under indictment for a felony. 18 U. S. C. § 922 (h) (1). If he received the firearm after his conviction, however, the term of imprisonment could not exceed two years. Similarly, because § 922 (h) alone proscribes receipt of ammunition, a felon who obtained a single bullet could receive a 5-year sentence, while receipt of a firearm would be punishable by no more than two years' imprisonment under § 1202 (a). In addition, the Court of Appeals' analysis leaves uncertain the result that would obtain if a sentencing judge wished to impose a maximum prison sentence and a maximum fine for conduct violative of both Titles. The doctrine of lenity would suggest that the $5,000 maximum of § 924 (a) and the 2-year maximum of § 1202 (a) would apply. However, if the doctrine of implied repeal controls, arguably the $10,000 fine authorized by § 1202 (a) could be imposed for a violation of § 922 (h). See *infra,* at 122.

utory language. See *Barrett* v. *United States*, 423 U. S. 212, 217 (1976). By its express terms, § 1202 (a) limits its penalty scheme exclusively to convictions obtained under that provision. Where, as here, "Congress has conveyed its purpose clearly, . . . we decline to manufacture ambiguity where none exists." *United States* v. *Culbert*, *supra*, at 379.

Nor can § 1202 (a) be interpreted as implicitly repealing § 924 (a) whenever a defendant's conduct might violate both Titles. For it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 155 (1976). Rather, the legislative intent to repeal must be manifest in the "'positive repugnancy between the provisions.'" *United States* v. *Borden Co.*, 308 U. S. 188, 199 (1939). In this case, however, the penalty provisions are fully capable of coexisting because they apply to convictions under different statutes.

Finally, the maxim that statutes should be construed to avoid constitutional questions offers no assistance here. This "'cardinal principle' of statutory construction . . . is appropriate only when [an alternative interpretation] is 'fairly possible'" from the language of the statute. *Swain* v. *Pressley*, 430 U. S. 372, 378 n. 11 (1977); see *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *United States* v. *Sullivan*, 332 U. S. 689, 693 (1948); *Shapiro* v. *United States*, 335 U. S. 1, 31 (1948). We simply are unable to discern any basis in the Omnibus Act for reading the term "five" in § 924 (a) to mean "two."

III

In resolving the statutory question, the majority below expressed "serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct." 581 F. 2d, at 633–634 (footnote omitted). Specifically, the court suggested that the statutes might (1) be void for vagueness, (2) implicate "due process and equal protection interest[s] in avoiding excessive prosecutorial discretion and in

obtaining equal justice," and (3) constitute an impermissible delegation of congressional authority. *Id.*, at 631–633. We find no constitutional infirmities.

A

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). See *Connally* v. *General Construction Co.*, 269 U. S. 385, 391–393 (1926); *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162 (1972); *Dunn* v. *United States*, *ante*, at 112–113. So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States* v. *Evans*, 333 U. S. 483 (1948); *United States* v. *Brown*, 333 U. S. 18 (1948); cf. *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966).

The provisions in issue here, however, unambiguously specify the activity proscribed and the penalties available upon conviction. See *supra*, at 119. That this particular conduct may violate both Titles does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.

B

This Court has long recognized that when an act violates more than one criminal statute, the Government may prose-

cute under either so long as it does not discriminate against any class of defendants. See *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45–46 (1952); *Rosenberg* v. *United States*, 346 U. S. 273, 294 (1953) (Clark, J., concurring, joined by five Members of the Court); *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962); *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 468 (1969); *United States* v. *Naftalin*, 441 U. S., at 778. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion. See *Confiscation Cases*, 7 Wall. 454 (1869); *United States* v. *Nixon*, 418 U. S. 683, 693 (1974); *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978).

The Court of Appeals acknowledged this "settled rule" allowing prosecutorial choice. 581 F. 2d, at 632. Nevertheless, relying on the dissenting opinion in *Berra* v. *United States*, 351 U. S. 131 (1956),[8] the court distinguished overlapping statutes with identical standards of proof from provisions that vary in some particular. 581 F. 2d, at 632–633. In the court's view, when two statutes prohibit "exactly the same conduct," the prosecutor's "selection of which of two penalties to apply" would be "unfettered." *Id.*, at 633, and n. 11. Because such prosecutorial discretion could produce "unequal justice," the court expressed doubt that this form of legislative redundancy was constitutional. *Id.*, at 631. We find this analysis factually and legally unsound.

Contrary to the Court of Appeals' assertions, a prosecutor's discretion to choose between §§ 922 (h) and 1202 (a) is not

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[8] *Berra* involved two tax evasion statutes, which the Court interpreted as proscribing identical conduct. The defendant, who was charged and convicted under the felony provision, argued that the jury should have been instructed on the misdemeanor offense as well. The Court rejected this contention and refused to consider whether the defendant's sentence was invalid because in excess of the maximum authorized by the misdemeanor statute. The dissent urged that permitting the prosecutor to control whether a particular act would be punished as a misdemeanor or a felony raised "serious constitutional questions." 351 U. S., at 139–140.

"unfettered." Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.[9] And a decision to proceed under § 922 (h) does not empower the Government to predetermine ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose a longer prison sentence than § 1202 (a) would permit and precludes him from imposing the greater fine authorized by § 1202 (a). More importantly, there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. Cf. *Rosenberg* v. *United States, supra,* at 294 (Clark, J., concurring); *Oyler* v. *Boles, supra,* at 456. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced. See U. S. Const., Art. II, §§ 2, 3; 28 U. S. C. §§ 515, 516; *United States* v. *Nixon, supra,* at 694.

C

Approaching the problem of prosecutorial discretion from a slightly different perspective, the Court of Appeals postulated that the statutes might impermissibly delegate to the Executive Branch the Legislature's responsibility to fix criminal pen-

[9] The Equal Protection Clause prohibits selective enforcement "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler* v. *Boles,* 368 U. S. 448, 456 (1962). Respondent does not allege that his prosecution was motivated by improper considerations.

alties. See *United States* v. *Hudson*, 7 Cranch 32, 34 (1812); *United States* v. *Grimaud*, 220 U. S. 506, 516–517, 519 (1911); *United States* v. *Evans*, 333 U. S., at 486. We do not agree. The provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws. Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty. See *United States* v. *Evans*, *supra*, at 486, 492, 495.

Accordingly, the judgment of the Court of Appeals is

Reversed.

BROWN *v.* FELSEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78–58. Argued February 21, 1979—Decided June 4, 1979

In the settlement of a state-court collection suit, respondent stipulated that petitioner should have judgment against respondent. Shortly thereafter, respondent filed for bankruptcy, and petitioner sought to establish that respondent's debt to him was not dischargeable because it was the product of respondent's fraud, deceit, and malicious conversion and thus came within §§ 17a (2) and (4) of the Bankruptcy Act, which provide that such debts are not affected by a discharge. The bankruptcy court granted summary judgment for respondent. The court held that the record in the state-court proceeding did not establish that respondent had committed fraud, and res judicata barred petitioner from offering additional evidence to prove the underlying nature of the debt. The District Court and Court of Appeals affirmed.

Held: The bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceeding when determining the dischargeability of respondent's debt. When a debtor asserts the new defense of bankruptcy, res judicata does not bar the creditor from offering additional evidence to meet that defense. A contrary rule would force premature federal issues on the state courts and would frustrate the command of the Bankruptcy Act that only honest debts are to be discharged. Pp. 131–139.

Reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Craig A. Christensen argued the cause for petitioner. With him on the briefs was *Deanna E. Hickman.*

Alex Stephen Keller argued the cause and filed a brief for respondent.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue here is whether a bankruptcy court may consider evidence extrinsic to the judgment and record of a prior

state suit when determining whether a debt previously reduced to judgment is dischargeable under § 17 of the Bankruptcy Act, 11 U. S. C. § 35.

I

Petitioner G. Garvin Brown III was a guarantor for respondent Mark Paul Felsen and Felsen's car dealership, Le Mans Motors, Inc. Petitioner's guarantee secured a bank loan that financed the dealership's trading in Lotus, Ferrari, and Lamborghini automobiles. In 1975, the lender brought a collection suit against petitioner, respondent, and Le Mans in Colorado state court. Petitioner filed an answer to the bank's complaint, and a cross-claim against respondent and Le Mans. The answer and the cross-claim, by incorporating the answer, alleged that respondent and Le Mans induced petitioner to sign the guarantee "by misrepresentations and non-disclosures of material facts." App. 35. The suit was settled by a stipulation. It provided that the bank should recover jointly and severally against all three defendants, and that petitioner should have judgment against respondent and Le Mans. Neither the stipulation nor the resulting judgment indicated the cause of action on which respondent's liability to petitioner was based. Because the case was settled, respondent's sworn deposition was never made part of the court record.

A short time later, respondent filed a petition for voluntary bankruptcy and sought to have his debt to petitioner discharged. Through discharge, the Bankruptcy Act provides "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt," *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244 (1934). By seeking discharge, however, respondent placed the rectitude of his prior dealings squarely in issue, for, as the Court has noted, the Act limits that opportunity to the "honest but unfortunate debtor." *Ibid.* Section 14 of the Act, 11 U. S. C. § 32, specifies that a *debtor* may not obtain

a discharge if he has committed certain crimes or offenses. Section 17a, the focus of this case, provides that certain *types* of debts are not affected by a discharge. These include, under § 17a (2), "liabilities for obtaining money or property by false pretenses or false representations . . . or for willful and malicious conversion of the property of another" and, under § 17a (4), debts that "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." [1]

In the bankruptcy court, petitioner sought to establish that respondent's debt to petitioner was not dischargeable. Petitioner alleged that the guarantee debt was the product of respondent's fraud, deceit, and malicious conversion and so came within §§ 17a (2) and 17a (4). Petitioner contended that respondent had prepared false title certificates, sold automobiles out of trust, and applied the proceeds to private purposes. Respondent answered and moved for summary judgment. Respondent said that the prior state-court proceeding did not result in a finding of fraud, and contended that res judicata barred relitigation of the nature of respondent's debt to petitioner, even though the application of § 17 had not been in issue in the prior proceeding.

Before 1970, such res judicata claims were seldom heard in federal court. Traditionally, the bankruptcy court determined whether the debtor merited a discharge under § 14, but left the dischargeability under § 17 of a particular debt to the court in which the creditor sued, after bankruptcy, to enforce his prior judgment. Typically, that court was a state court. In 1970, however, Congress altered § 17 to require creditors to apply to the bankruptcy court for adjudication

[1] In 1978, Congress repealed the Bankruptcy Act, effective October 1, 1979. See Bankruptcy Reform Act of 1978, Pub. L. 95–598, § 401 (a), 92 Stat. 2682. A case commenced under the Bankruptcy Act continues to be governed by it. § 403 (a), 92 Stat. 2683. Discharge provisions substantially similar to § 17 of the Bankruptcy Act appear in § 523 of the new law. 11 U. S. C. App. § 523 (1976 ed., Supp. II).

of certain dischargeability questions, including those arising under §§ 17a (2) and 17a (4).[2] In *In re Nicholas*, 510 F. 2d 160, cert. denied, 421 U. S. 1012 (1975), the United States Court of Appeals for the Tenth Circuit, confronting for the first time the res judicata question presented here, resolved it by holding that, in determining the dischargeability of a claim previously reduced to judgment, the District Court had properly limited its review to the record and judgment in the prior state-court proceeding. The Court of Appeals found that its decision accorded with the majority rule among state courts previously considering the question.

The bankruptcy court here, bound by *Nicholas*, somewhat reluctantly [3] confined its consideration to the judgment, pleadings, exhibits, and stipulation which were in the state-court record. It declined to hear other evidence, and it refused to consider respondent's deposition that had never been made part of that record. The court concluded that, because neither the judgment nor the record showed that petitioner's allegation of misrepresentation was the basis for the judgment on the cross-claim against respondent, the liability had not been shown to be within §§ 17a (2) and 17a (4). The court granted summary judgment for respondent and held that the debt was dischargeable. App. 44–48.

Both the United States District Court for the District of Colorado, *id.*, at 49, and the United States Court of Appeals for the Tenth Circuit affirmed. In an unpublished opinion, the Court of Appeals followed *Nicholas*, applied res judicata, and said that the prior consent decree was conclusive as to the nature of respondent's liability. The court noted that neither the stipulation nor the judgment mentioned fraud, and the

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[2] See Pub. L. 91–467, §§ 5–7, 84 Stat. 992; H. R. Rep. No. 91–1502 (1970); S. Rep. No. 91–1173 (1970).

[3] The court observed that, in its experience, the *Nicholas* rule had "created more difficulties and more problems than it has solved." Tr. in No. 76 B 56 (Colo., Dec. 14, 1976), p. 13.

court said that petitioner had not even met the state requirement that fraud be pleaded with specificity. See Colo. Rule Civ. Proc. 9 (b). The court agreed that respondent's debt was dischargeable. App. 50–56.

Since *Nicholas* was decided, every other Court of Appeals that has considered the question has rejected res judicata and held that extrinsic evidence may be admitted in order to determine accurately the dischargeability under § 17 of a debt previously reduced to judgment in state court.[4] We granted certiorari to resolve this conflict. 439 U. S. 925 (1978).

II

Res judicata ensures the finality of decisions. Under res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana* v. *United States*, 440 U. S. 147, 153 (1979). Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 378 (1940); 1B J. Moore, Federal Practice ¶ 0.405 [1] (2d ed. 1974). Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

Bankruptcy often breeds litigation, and respondent contends that the policy of repose which underlies res judicata

[4] See *In re Wright*, 584 F. 2d 83, 84 (CA5 1978); *In re McMillan*, 579 F. 2d 289, 293, and n. 6 (CA3 1978); *In re Houtman*, 568 F. 2d 651, 653–654 (CA9 1978); *In re Pigge*, 539 F. 2d 369, 371–372 (CA4 1976). Two Circuits held that extrinsic evidence was admissible under pre-1970 law. See *Martin* v. *Rosenbaum*, 329 F. 2d 817, 820 (CA9 1964); *In re Johnson*, 323 F. 2d 574 (CA3 1963). But cf. *Chernick* v. *United States*, 492 F. 2d 1349, 1351, and n. 4 (CA7 1974) (bound by prior post-bankruptcy judgment). This Court, in dictum, indicated that extrinsic evidence could be admitted in a proceeding under the 1867 Bankruptcy Act. *Strang* v. *Bradner*, 114 U. S. 555, 560–561 (1885).

has particular force here. Respondent argues that petitioner chose not to press the question of fraud in the state-court proceeding even though an adjudication of fraud would have entitled petitioner to extraordinary remedies such as exemplary damages and body execution.[5] Respondent says that because petitioner did not obtain a stipulation concerning fraud in the prior state-court proceeding, he is now barred from litigating matters that could have been concluded in the consent judgment. See *United States* v. *Armour & Co.*, 402 U. S. 673, 681–682 (1971). Applying res judicata in bankruptcy court, it is argued, prevents a creditor from raising as an afterthought claims so insubstantial that they had previously been overlooked. In respondent's view, res judicata stops harassment and promotes the orderly processes of justice by encouraging the consolidation of the entire dispute between debtor and creditor into one prior proceeding.

Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry. Petitioner contends, and we agree, that here careful inquiry reveals that neither the interests served by res judicata, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served by foreclosing petitioner from submitting additional evidence to prove his case.

A

Respondent's res judicata claim is unlike those customarily entertained by the courts. For example, this case is readily distinguishable from *Chicot County Drainage Dist.* v. *Baxter*

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[5] In Colorado, body execution is a statutory remedy which, under certain circumstances, permits a creditor to have a tortious judgment debtor imprisoned at the creditor's expense. See *Hershey* v. *People*, 91 Colo. 113, 12 P. 2d 345 (1932); Colo. Rev. Stat. § 13–59–103 (1973).

State Bank, supra. There, bondholders participated in a federal statutory proceeding for the readjustment of indebtedness and a judgment was entered. After parties from another State succeeded in having the statute declared unconstitutional, the bondholders brought a suit seeking to collect the sums that had been due before readjustment. The Court held that res judicata barred the second suit and said that the bondholders "were not the less bound by the decree" because they failed to raise the constitutional claim in the first proceeding. 308 U. S., at 375.

Here, in contrast, petitioner readily concedes that the prior decree is binding. That is the cornerstone of his claim. He does not assert a new ground for recovery, nor does he attack the validity of the prior judgment. Rather, what he is attempting to meet here is the new defense of bankruptcy which respondent has interposed between petitioner and the sum determined to be due him. A substantial minority of state-court decisions, particularly those following *Fidelity & Casualty Co.* v. *Golombosky*, 133 Conn. 317, 322–324, 50 A. 2d 817, 819–820 (1946) (Maltbie, C. J.), have recognized this distinction and have refused to apply res judicata in determining the dischargeability of debts previously reduced to judgment.[6] Respondent has upset the repose that would

[6] See *United States Credit Bureau* v. *Manning*, 147 Cal. App. 2d 558, 562, 305 P. 2d 970, 973 (2d Dist. 1957); *Welsh* v. *Old Dominion Bank*, 229 A. 2d 455, 456 (D. C. App. 1967); *Levin* v. *Singer*, 227 Md. 47, 57–60, 175 A. 2d 423, 428–430 (1961); *Fireman's Fund Indemnity Co.* v. *Caruso*, 252 Minn. 435, 439–441, 90 N. W. 2d 302, 305–306 (1958); *Durrett* v. *Smith*, 358 S. W. 2d 261, 263 (Mo. App. 1962). The *Golombosky* case has been applauded by the commentators. See J. MacLachlan, Bankruptcy 111 (1956); Note, Fraudulent Financial Statements and Section 17 of the Bankruptcy Act—The Creditor's Dilemma, 1967 Utah L. Rev. 281, 288–290, 296; Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 885 (1952); Comment, 60 Harv. L. Rev. 638 (1947); Comment, 33 Va. L. Rev. 508 (1947). Cf. 8 H. Remington, Bankruptcy Law 186 (6th ed. 1955) (contrary decisions are sound only

justify treating the prior state-court proceeding as final, and it would hardly promote confidence in judgments to prevent petitioner from meeting respondent's new initiative.

B

Respondent contends that the § 17 questions raised here, or similar issues of state law, could have been considered in the prior state-court proceeding and therefore are not "new." Respondent argues that the state-court collection suit is the appropriate forum for resolving all debtor-creditor disputes, including those concerning dischargeability. While in some circumstances the consolidation of proceedings may be desirable, here consolidation would undercut a statutory policy in favor of resolving § 17 questions in bankruptcy court, and would force state courts to decide these questions at a stage when they are not directly in issue and neither party has a full incentive to litigate them. See *In re Pigge*, 539 F. 2d 369, 371–372 (CA4 1976).

1. Considerations material to discharge are irrelevant to the ordinary collection proceeding. The creditor sues on the

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when applied to the "typical 'afterthought' and harassment case"). But see Note, 21 J. Nat. Assn. of Referees in Bankruptcy 94 (1947).

Other States, however, continued to apply res judicata and refused to admit additional evidence. See *Miller* v. *Rush*, 155 Colo. 178, 188, 393 P. 2d 565, 571 (1964); *Security National Bank* v. *Boccio*, 60 Misc. 2d 547, 548, 303 N. Y. S. 2d 610, 611 (Nassau Cty. 1969); *Universal C. I. T. Credit Corp.* v. *Woodmansee*, 213 Tenn. 429, 437, 374 S. W. 2d 386, 390 (1964); *Beehive State Bank* v. *Buntine*, 17 Utah 2d 351, 352, 411 P. 2d 967, 968 (1966); *Northey* v. *Vandermark*, 66 Wash. 2d 173, 176, 401 P. 2d 873, 875–876 (1965).

The state decisions predating *Golombosky* are close to unanimity in adhering to res judicata. See *Aetna Casualty & Surety Co.* v. *Sentilles*, 160 So. 149, 151 (La. App. 1935); *Rice* v. *Guider*, 275 Mich. 14, 18, 265 N. W. 777, 778 (1936); *Ehnes* v. *Generazzo*, 19 N. J. Misc. 393, 396, 20 A. 2d 513, 515 (Com. Pl. 1941); *Scott* v. *Corn*, 19 S. W. 2d 412, 415 (Tex. Civ. App. 1929), cert. denied, 281 U. S. 736 (1930); Annot., 170 A. L. R. 368 (1947). But see *Gehlen* v. *Patterson*, 83 N. H. 328, 331, 141 A. 914, 916 (1928).

instrument which created the debt. Even if an issue similar to those created by § 17 should arise, the state-law concept is likely to differ from that adopted in the federal statute. See 1A J. Moore, J. Mulder, & R. Oglebay, Collier on Bankruptcy ¶ 17.16 [6], p. 1650.1 (14th ed. 1978). For example, in *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328 (1934), the Court held that a mere technical conversion by a bankrupt dealer in automobiles was not "willful and malicious" within the meaning of § 17 by virtue of being actionable under state law, nor was a misappropriation of funds, held pursuant to a "trust receipt," a breach of an express trust sufficient to constitute an act done "as an officer or in any fiduciary capacity."

When § 17 issues are not identical to those arising under state law, the parties have little incentive to litigate them. In the collection suit, the debtor's bankruptcy is still hypothetical. The rule proposed by respondent would force an otherwise unwilling party to try § 17 questions to the hilt in order to protect himself against the mere possibility that a debtor might take bankruptcy in the future. In many cases, such litigation would prove, in the end, to have been entirely unnecessary, and it is not surprising that at least one state court has expressly refused to embroil itself in an advisory adjudication of this kind. See *Pioneer Finance & Thrift Co.* v. *Powell*, 21 Utah 2d 201, 204, 443 P. 2d 389, 391 (1968). And absent trial on the merits, there is no particular reason to favor extraneous facts thrown into a record for § 17 purposes over facts adduced before the bankruptcy court.

2. If a state court should expressly rule on § 17 questions, then giving finality to those rulings would undercut Congress' intention to commit § 17 issues to the jurisdiction of the bankruptcy court. The 1970 amendments eliminated post-bankruptcy state-court collection suits as a means of resolving certain § 17 dischargeability questions. In those suits, creditors had taken advantage of debtors who were unable to retain counsel because bankruptcy had stripped them of their

assets. Congress' primary purpose was to stop that abuse. A secondary purpose, however, was to take these § 17 claims away from state courts that seldom dealt with the federal bankruptcy laws and to give those claims to the bankruptcy court so that it could develop expertise in handling them.[7] By the express terms of the Constitution, bankruptcy law is federal law, U. S. Const., Art. I, § 8, cl. 4, and the Senate Report accompanying the amendment described the bankruptcy court's jurisdiction over these § 17 claims as "exclusive." S. Rep. No. 91–1173, p. 2 (1970). While Congress did not expressly confront the problem created by prebankruptcy state-court adjudications, it would be inconsistent with the philosophy of the 1970 amendments to adopt a policy of res judicata which takes these § 17 questions away from bankruptcy courts and forces them back into state courts. See *In re McMillan*, 579 F. 2d 289, 293 (CA3 1978); *In re Houtman*, 568 F. 2d 651, 654 (CA9 1978); *In re Pigge*, 539 F. 2d, at 371; 1 D. Cowans, Bankruptcy Law and Practice

[7] See S. Rep. No. 91–1173, pp. 2–3 (1970); H. R. Rep. No. 91–1502, p. 1 (1970). A statement by Professor Lawrence King, prepared for the National Bankruptcy Conference, included in both the House and Senate Reports and placed in the Congressional Record by Representative Wiggins, said:

"One of the strongest arguments in support of the bill is that, if the bill is passed, a single court, to wit, the bankruptcy court, will be able to pass upon the question of dischargeability of a particular claim and it will be able to develop an expertise in resolving the problem in particular cases. The State court judges, however capable they may be, do not have enough cases to acquire sufficient experience to enable them to develop this expertise. Moreover, even under the present system, in the last analysis, it is the U. S. Supreme Court which has the ultimate word on the construction of section 17 of the Bankruptcy Act. . . . Since this is a Federal statute, the Federal courts necessarily have the final word as to the meaning of any terms contained therein." S. Rep. No. 91–1173, p. 9 (1970); H. R. Rep. No. 91–1502, p. 8 (1970); 116 Cong. Rec. 34819 (1970).

See also S. Rep. No. 91–1173, p. 6 (1970) (letter of Royal E. Jackson, Chief, Division of Bankruptcy, quoting Prof. Charles Seligson).

§ 253, p. 298 (1978). Compare 1A J. Moore, J. Mulder, & R. Oglebay, Collier on Bankruptcy ¶ 17.16 [6], p. 1650.1 n. 50 (14th ed. 1978) (1970 Act), with *id.*, ¶ 17.16 [4], p. 1643 (prior state law).

Respondent argues that petitioner could have avoided such a result and preserved his dischargeability contentions for bankruptcy court review by bargaining for a stipulation that § 17 issues were not resolved by the consent judgment. It makes little sense, however, to resolve a federal dischargeability question according to whether or not the parties in state court waived their right to engage in hypothetical litigation in an inappropriate forum.

3. Respondent also contends that petitioner had an adequate incentive to prove state-law fraud, which might have entailed proof identical to that required by § 17. Petitioner, however, rejected whatever lure exemplary damages and body execution may have provided. That rejection does not conclusively show that petitioner thought respondent was innocent of fraud. Petitioner may have thought those remedies would not be advantageous to him.[8] While respondent is certainly entitled to claim that res judicata would bar further pursuit of those extraordinary remedies in state court, their hypothetical desirability provides no basis for preventing

[8] So long as a debtor is solvent, the debtor and creditor alike may prefer a simple contract suit to complex tort litigation. Default and consent judgments are common in collection proceedings. For the creditor, the prospect of increased attorney's fees and the likelihood of driving the debtor into bankruptcy may offset the advantages of exemplary damages or other extraordinary remedies. Bankruptcy deprives the debtor of his creditworthiness and so impairs his ability to repay. In the words of a Shakespearean creditor, fearing the worst:

> "When every feather sticks in his own wing,
> Which Timon will be left a naked Gull,
> Which flashes now a Phoenix." Timon of Athens, Act 2, Scene 1, in VII The Works of Shakespeare 294 (Henley ed. 1903).

Nor does body execution aid in the collection of a debt if the debtor needs to be out of jail in order to earn the money to repay the debt.

petitioner from recovering on the debt, the remedy he elected from the beginning.

C

Refusing to apply res judicata here would permit the bankruptcy court to make an accurate determination whether respondent in fact committed the deceit, fraud, and malicious conversion which petitioner alleges. These questions are now, for the first time, squarely in issue. They are the type of question Congress intended that the bankruptcy court would resolve. That court can weigh all the evidence, and it can also take into account whether or not petitioner's failure to press these allegations at an earlier time betrays a weakness in his case on the merits.

Some indication that Congress intended the fullest possible inquiry arises from the history of § 17. In the 1898 Bankruptcy Act, Congress provided that only "judgments" sounding in fraud would be excepted from a bankrupt's discharge. 30 Stat. 550. In 1903, Congress substituted "liabilities" for "judgments." 32 Stat. 798. The amendment, said the accompanying House Report, was "in the interest of justice and honest dealing and honest conduct," and it was intended "to exclude beyond peradventure certain liabilities growing out of offenses against good morals." [9] This broad language suggests that all debts arising out of conduct specified in § 17 should be excepted from discharge and the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt. Cf. *Hargadine-McKittrick Dry Goods Co.* v. *Hudson*, 111 F. 361, 362–363 (ED Mo. 1901), aff'd, 122 F. 232, 235–236 (CA8 1903) (comparing 1903 Act to prior law).

In sum, we reject respondent's contention that res judicata applies here and we hold that the bankruptcy court is not confined to a review of the judgment and record in the prior

[9] H. R. Rep. No. 1698, 57th Cong., 1st Sess., 3, 6 (1902). See 36 Cong. Rec. 1375 (1903).

state-court proceedings when considering the dischargeability of respondent's debt. Adopting the rule respondent urges would take § 17 issues out of bankruptcy courts well suited to adjudicate them, and force those issues onto state courts concerned with other matters, all for the sake of a repose the bankrupt has long since abandoned.[10] This we decline to do.

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[10] This case concerns res judicata only, and not the narrower principle of collateral estoppel. Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit. *Montana* v. *United States*, 440 U. S. 147, 153 (1979); *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326 n. 5 (1979); *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353 (1877). If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of § 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court.

Because respondent does not contend that the state litigation actually and necessarily decided either fraud or any other question against petitioner, we need not and therefore do not decide whether a bankruptcy court adjudicating a § 17 question should give collateral-estoppel effect to a prior state judgment. In another context, the Court has held that a bankruptcy court should give collateral-estoppel effect to a prior decision. *Heiser* v. *Woodruff*, 327 U. S. 726, 736 (1946). The 1970 amendments to the Bankruptcy Act, however, have been interpreted by some commentators to permit a contrary result. See 1A J. Moore, J. Mulder, & R. Oglebay, Collier on Bankruptcy § 17.16 [6], p. 1650.2 (14th ed. 1978); Countryman, The New Dischargeability Law, 45 Am. Bankr. L. J. 1, 49–50 (1971). But see 1 D. Cowans, Bankruptcy Law and Practice § 253 (1978).

COUNTY COURT OF ULSTER COUNTY, NEW YORK, ET AL. *v.* ALLEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77–1554. Argued February 22, 1979—Decided June 4, 1979

Respondents (three adult males) and a 16-year-old girl (Jane Doe) were jointly tried in a New York state court on charges, *inter alia*, of illegally possessing two loaded handguns found in an automobile in which they were riding when it was stopped for speeding. The guns had been positioned crosswise in Jane Doe's open handbag on either the front floor or front seat on the passenger side where she was sitting. All four defendants objected to the introduction of the guns into evidence, arguing that the State had not adequately demonstrated a connection between the guns and the defendants. The trial court overruled the objection, relying on the presumption of possession created by a New York statute providing that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle, except when, *inter alia*, the firearm is found "upon the person" of one of the occupants. The trial court also denied respondents' motion to dismiss the charges on the alleged ground that such exception applied because the guns were found on Jane Doe's person, the court concluding that the applicability of the exception was a question of fact for the jury. After being instructed that it was entitled to infer possession from the defendants' presence in the car, to consider all circumstances tending to support or contradict such inference, and to decide the matter for itself without regard to how much evidence the defendants introduced, the jury convicted all four defendants of illegal possession of the handguns. Defendants' post-trial motion in which they challenged the constitutionality of the New York statute as applied to them, was denied. Both the intermediate appellate court and the New York Court of Appeals affirmed the convictions, the latter court holding that it was a jury question whether the guns were on Jane Doe's person, treating this question as having been resolved in the prosecution's favor, and concluding that therefore the presumption applied and that there was sufficient evidence to support the convictions. The court also summarily rejected the argument that the presumption was unconstitutional as applied in this case. Respondents then filed a

habeas corpus petition in Federal District Court, contending that they were denied due process of law by the application of the statutory presumption. The District Court issued the writ, holding that respondents had not "deliberately bypassed" their federal claim by their actions at trial and that the mere presence of two guns in a woman's handbag in a car could not reasonably give rise to the inference that they were in the possession of three other persons in the car. The United States Court of Appeals affirmed, holding that the New York Court of Appeals had decided respondents' constitutional claim on its merits rather than on any independent state procedural ground that might have barred collateral relief and, without deciding whether the presumption was constitutional as applied in this case, that the statute is unconstitutional on its face.

Held:

1. The District Court had jurisdiction to entertain respondents' claim that the statutory presumption is unconstitutional. There is no support in New York law or the history of this litigation for an inference that the New York courts decided such claim on an independent and adequate state procedural ground that bars the federal courts from addressing the issue on habeas corpus. If neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim. Pp. 147–154.

2. The United States Court of Appeals erred in deciding the facial constitutionality issue. In analyzing a mandatory presumption, which the jury must accept even if it is the sole evidence of an element of an offense (as opposed to a purely permissive presumption, which allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant), it is irrelevant that there is ample evidence in the record other than the presumption to support a conviction. Without determining whether the presumption in this case was mandatory, the Court of Appeals analyzed it on its face as if it were, despite the fact that the state trial judge's instructions made it clear that it was not. Pp. 154–163.

3. As applied to the facts of this case, the statutory presumption is constitutional. Under the circumstances, the jury would have been entirely reasonable in rejecting the suggestion that the guns were in Jane Doe's sole possession. Assuming that the jury did reject it, the case is tantamount to one in which the guns were lying on the car's floor or seat in the plain view of respondents, and in such a case it is

surely rational to infer that each of the respondents was fully aware of the guns' presence and had both the ability and the intent to exercise dominion and control over them. The application of the presumption in this case thus comports with the standard, *Leary* v. *United States*, 395 U. S. 6, that there be a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and that the latter is "more likely than not to flow from" the former. Moreover, the presumption should not be judged by a more stringent "reasonable doubt" test, insofar as it is a permissive rather than a mandatory presumption. Pp. 163–167.

568 F. 2d 998, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 167. POWELL, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 168.

Eileen F. Shapiro, Assistant Attorney General of New York, argued the cause for petitioners. With her on the briefs were *Robert Abrams*, Attorney General, *Louis J. Lefkowitz*, former Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, *Patricia C. Armstrong*, Assistant Attorney General, and *George D. Zuckerman*, Assistant Solicitor General.

Michael Young argued the cause and filed a brief for respondents.

MR. JUSTICE STEVENS delivered the opinion of the Court.

A New York statute provides that, with certain exceptions, the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle.[1] The United States Court of Appeals for the

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[1] New York Penal Law § 265.15 (3) (McKinney 1967):

"The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such

Second Circuit held that respondents may challenge the constitutionality of this statute in a federal habeas corpus proceeding and that the statute is "unconstitutional on its face." 568 F. 2d 998, 1009. We granted certiorari to review these holdings and also to consider whether the statute is constitutional in its application to respondents. 439 U. S. 815.

Four persons, three adult males (respondents) and a 16-year-old girl (Jane Doe, who is not a respondent here), were jointly tried on charges that they possessed two loaded handguns, a loaded machinegun, and over a pound of heroin found in a Chevrolet in which they were riding when it was stopped for speeding on the New York Thruway shortly after noon on March 28, 1973. The two large-caliber handguns, which together with their ammunition weighed approximately six pounds, were seen through the window of the car by the investigating police officer. They were positioned crosswise in an open handbag on either the front floor or the front seat of the car on the passenger side where Jane Doe was sitting. Jane Doe admitted that the handbag was hers.[2] The machine-

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weapon, instrument or appliance is found, except under the following circumstances:

"(a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

In addition to the three exceptions delineated in §§ 265.15 (3) (a)–(c) above as well as the stolen-vehicle and public-omnibus exception in § 265.15 (3) itself, § 265.20 contains various exceptions that apply when weapons are present in an automobile pursuant to certain military, law enforcement, recreational, and commercial endeavors.

[2] The arrest was made by two state troopers. One officer approached the driver, advised him that he was going to issue a ticket for speeding, requested identification, and returned to the patrol car. After a radio

gun and the heroin were discovered in the trunk after the police pried it open. The car had been borrowed from the driver's brother earlier that day; the key to the trunk could not be found in the car or on the person of any of its occupants, although there was testimony that two of the occupants had placed something in the trunk before embarking in the borrowed car.[3] The jury convicted all four of possession of the handguns and acquitted them of possession of the contents of the trunk.

Counsel for all four defendants objected to the introduction into evidence of the two handguns, the machinegun, and the drugs, arguing that the State had not adequately demonstrated a connection between their clients and the contraband. The trial court overruled the objection, relying on the pre-

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check indicated that the driver was wanted in Michigan on a weapons charge, the second officer returned to the vehicle and placed the driver under arrest. Thereafter, he went around to the right side of the car and, in "open view," saw a portion of a 45-caliber automatic pistol protruding from the open purse on the floor or the seat. *People* v. *Lemmons*, 40 N. Y. 2d 505, 508–509, 354 N. E. 2d 836, 838–839 (1976). He opened the car door, removed that gun, and saw a .38-caliber revolver in the same handbag. He testified that the crosswise position of one or both of the guns kept the handbag from closing. After the weapons were secured, the two remaining male passengers, who had been sitting in the rear seat, and Jane Doe were arrested and frisked. A subsequent search at the police station disclosed a pocketknife and marihuana concealed on Jane Doe's person. Tr. 187–192, 208–214, 277–278, 291–297, 408.

[3] Early that morning, the four defendants had arrived at the Rochester, N. Y., home of the driver's sister in a Cadillac. Using her telephone, the driver called their brother, advised him that "his car ran hot" on the way there from Detroit and asked to borrow the Chevrolet so that the four could continue on to New York City. The brother brought the Chevrolet to the sister's home. He testified that he had recently cleaned out the trunk and had seen no weapons or drugs. The sister also testified, stating that she saw two of the defendants transfer some unidentified item or items from the trunk of one vehicle to the trunk of the other while both cars were parked in her driveway. *Id.*, at 17–19, 69–73, 115–116, 130–131, 193–194.

sumption of possession created by the New York statute. Tr. 474–483. Because that presumption does not apply if a weapon is found "upon the person" of one of the occupants of the car, see n. 1, *supra,* the three male defendants also moved to dismiss the charges relating to the handguns on the ground that the guns were found on the person of Jane Doe. Respondents made this motion both at the close of the prosecution's case and at the close of all evidence. The trial judge twice denied it, concluding that the applicability of the "upon the person" exception was a question of fact for the jury. Tr. 544–557, 589–590.

At the close of the trial, the judge instructed the jurors that they were entitled to infer possession from the defendants' presence in the car. He did not make any reference to the "upon the person" exception in his explanation of the statutory presumption, nor did any of the defendants object to this omission or request alternative or additional instructions on the subject.

Defendants filed a post-trial motion in which they challenged the constitutionality of the New York statute as applied in this case. The challenge was made in support of their argument that the evidence, apart from the presumption, was insufficient to sustain the convictions. The motion was denied, *id.,* at 775–776, and the convictions were affirmed by the Appellate Division without opinion. *People* v. *Lemmons,* 49 App. Div. 2d 639, 370 N. Y. S. 2d 243 (1975).

The New York Court of Appeals also affirmed. *People* v. *Lemmons,* 40 N. Y. 2d 505, 354 N. E. 2d 836 (1976). It rejected the argument that as a matter of law the guns were on Jane Doe's person because they were in her pocketbook. Although the court recognized that in some circumstances the evidence could only lead to the conclusion that the weapons were in one person's sole possession, it held that this record presented a jury question on that issue. Since the defendants had not asked the trial judge to submit the question to the

jury, the Court of Appeals treated the case as though the jury had resolved this fact question in the prosecution's favor. It therefore concluded that the presumption did apply and that there was sufficient evidence to support the convictions. *Id.*, at 509–512, 354 N. E. 2d, at 839–841. It also summarily rejected the argument that the presumption was unconstitutional as applied in this case. See *infra*, at 153–154.

Respondents filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York contending that they were denied due process of law by the application of the statutory presumption of possession. The District Court issued the writ, holding that respondents had not "deliberately bypassed" their federal claim by their actions at trial and that the mere presence of two guns in a woman's handbag in a car could not reasonably give rise to the inference that they were in the possession of three other persons in the car. App. to Pet. for Cert. 33a–36a.

The Court of Appeals for the Second Circuit affirmed, but for different reasons. First, the entire panel concluded that the New York Court of Appeals had decided respondents' constitutional claim on its merits rather than on any independent state procedural ground that might have barred collateral relief. Then, the majority of the court, without deciding whether the presumption was constitutional as applied in this case, concluded that the statute is unconstitutional on its face because the "presumption obviously sweeps within its compass (1) many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but not permitted access to it." [4] Concurring separately, Judge

[4] The majority continued:

"Nothing about a gun, which may be only a few inches in length (e. g., a Baretta or Derringer) and concealed under a seat, in a glove compartment or beyond the reach of all but one of the car's occupants, assures that its presence is known to occupants who may be hitchhikers or other

Timbers agreed with the District Court that the statute was unconstitutional as applied but considered it improper to reach the issue of the statute's facial constitutionality. 568 F. 2d, at 1011–1012.

The petition for a writ of certiorari presented three questions: (1) whether the District Court had jurisdiction to entertain respondents' claim that the presumption is unconstitutional; (2) whether it was proper for the Court of Appeals to decide the facial constitutionality issue; and (3) whether the application of the presumption in this case is unconstitutional. We answer the first question in the affirmative, the second two in the negative. We accordingly reverse.

I

This is the sixth time that respondents have asked a court to hold that it is unconstitutional for the State to rely on the presumption because the evidence is otherwise insufficient to convict them.[5] No court has refused to hear the claim or

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casual passengers, much less that they have any dominion or control over it." 568 F. 2d, at 1007.

[5] Respondents first made the argument in a memorandum of law in support of their unsuccessful post-trial motion to set aside the verdict. App. 36a–38a. That memorandum framed the argument in three parts precisely as respondents would later frame it in their briefs in the Appellate Division and Court of Appeals, see *id.*, at 41a–44a, 50a–52a, and in their petition for a writ of habeas corpus. See *id.*, at 6a–10a: First, "[t]he only evidence" relied upon to convict them was their presence in an automobile in which the two handguns were found. *Id.*, at 35a. Second, but for the presumption of possession, this evidence was "totally insufficient to sustain the conviction." *Id.*, at 38a. And third, that presumption is "unconstitutional as applied" (or, "'arbitrary,' and hence unconstitutional") under *Leary* v. *United States*, 395 U. S. 6, 36, a case in which this Court established standards for determining the validity under the Due Process Clauses of statutory presumptions in criminal cases. App. 36a. This sufficiency-focused argument on the presumption is amply supported in our case law. *E. g.*, *Turner* v. *United States*, 396 U. S. 398, 424 ("[A] conviction resting on [an unconstitutional] presump-

suggested that it was improperly presented. Nevertheless, because respondents made it for the first time only after the jury had announced its verdict, and because the state courts were less than explicit in their reasons for rejecting it, the question arises whether the New York courts did so on the basis of an independent and adequate state procedural ground that bars the federal courts from addressing the issue on habeas corpus.[6] See *Wainwright* v. *Sykes*, 433 U. S. 72; *Fay*

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tion cannot be deemed a conviction based on sufficient evidence"). See also *Rossi* v. *United States*, 289 U. S. 89, 90.

Although respondents' memorandum did not cite the provision of the Constitution on which they relied, their citation of our leading case applying that provision, in conjunction with their use of the word "unconstitutional," left no doubt that they were making a federal constitutional argument. Indeed, by its responses to that argument at every step of the way, the State made clear that it, at least, understood the federal basis for the claim. *E. g.*, Respondent's Brief and Appendix in the Court of Appeals of the State of New York, p. 9.

[6] Petitioners contend that, in addition to the timing of respondents' claim and the alleged silence of the New York courts, there is another basis for concluding that those courts rejected respondents' claim on procedural grounds. Petitioners point out that respondents—having unsuccessfully argued to the trial court (as they would unsuccessfully argue on appeal) that the "upon the person" exception applied as a matter of law in their case—failed either to ask the trial court to instruct the jury to consider the exceptions or to object when the court omitted the instruction. They further point out that the majority of the New York Court of Appeals, after concluding that the exception's application was a jury question in this case, refused to review the trial court's omission of an instruction on the issue because of respondents' failure to protest that omission. 40 N. Y. 2d, at 512, 354 N. E. 2d, at 841.

Petitioners argue that we should infer from the Court of Appeals' explicit treatment of this state-law claim—a claim never even pressed on appeal—how that court implicitly treated the federal claim that has been the crux of respondents' litigation strategy from its post-trial motion to the present. There is no basis for the inference. Arguing on appeal that an instruction that was never requested should have been given is far more disruptive to orderly judicial proceedings than arguing in a post-trial motion that the evidence was insufficient to support the verdict. Moreover, that the Court of Appeals felt compelled expressly to reject, on

v. *Noia*, 372 U. S. 391, 438. We conclude that there is no support in either the law of New York or the history of this litigation for an inference that the New York courts decided respondents' constitutional claim on a procedural ground, and that the question of the presumption's constitutionality is therefore properly before us. See *Franks* v. *Delaware*, 438 U. S. 154, 161–162; *Mullaney* v. *Wilbur*, 421 U. S. 684, 704–705, and n. (REHNQUIST, J., concurring).[7]

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procedural grounds, an argument never made is hardly proof that they would silently reject on similar grounds an argument that *was* forcefully made. As we discuss, *infra*, at 153–154, it is clear that the court did address the constitutional question and did so on the merits, albeit summarily.

Petitioners also contend that respondents, having failed to seek a jury determination based on state law that the presumption does not apply, may not now argue that the presumption is void as a matter of federal constitutional law. The argument is unpersuasive. Respondents' failure to demand an instruction on the state-law exception is no more and no less than a concession on their part that as a matter of state law the guns were *not* found "upon the person" of any occupant of the car as that phrase is interpreted by the New York courts, and therefore, again as a matter of state law, that the presumption of possession is applicable. The New York Court of Appeals reviewed the case in that posture, and we do the same.

[7] Petitioners advance a second reason why there is no federal jurisdiction in this case. Respondents were convicted on the basis of a statutory presumption they argue is unconstitutional. Following the Court of Appeals' affirmance of their conviction, they could have appealed that decision to this Court under 28 U. S. C. § 1257 (2) and thereby forced a binding federal disposition of the matter. Because respondents failed to do so, petitioners argue that respondents waived any right to federal review of the decision on habeas corpus.

In *Fay* v. *Noia*, 372 U. S. 391, 435–438, we rejected a similar argument that habeas corpus review was unavailable in advance of a petition for certiorari. See also *Stevens* v. *Marks*, 383 U. S. 234, in which the Court entertained a challenge to a state statute in a federal habeas corpus proceeding even though the defendant had not pursued that challenge on appeal to this Court prior to filing his petition for habeas corpus. The analysis of the federal habeas statute that led us to our conclusion in *Fay* is equally applicable in the present situation. That statute gives

New York has no clear contemporaneous-objection policy that applies in this case.[8] No New York court, either in this litigation or in any other case that we have found, has ever expressly refused on contemporaneous-objection grounds to consider a post-trial claim such as the one respondents made. Cf. *Wainwright* v. *Sykes, supra,* at 74. Indeed, the rule in New York appears to be that "insufficiency of the evidence" claims may be raised at any time until sentence has been

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federal courts jurisdiction to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" if that custody allegedly violates "the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254 (a). The only statutory exception to this jurisdiction arises when the petitioner has failed to exhaust "the remedies available in the courts of the State." § 2254 (b). As was said in *Fay* with regard to petitions for certiorari under 28 U. S. C. § 1257 (3), direct appeals to this Court under § 1257 (2) are not "'remedies available in the courts of the State.'" 372 U. S., at 436. Accordingly, there is no statutory requirement of an appeal to this Court as a predicate to habeas jurisdiction.

[8] New York's cautious contemporaneous-objection policy is embodied in N. Y. Crim. Proc. Law § 470.05 (2) (McKinney 1971):

"For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction *or at any subsequent time when the court had an opportunity of effectively changing the same*" (emphasis added).

That policy is carefully limited by several statutory qualifications in addition to the one italicized above. First, the form of the "protest" is not controlling so long as its substance is clear. *Ibid.* Second, such protests may be made "expressly or impliedly." *Ibid.* Third, once a protest is made, it need not be repeated at each subsequent disposition of the matter. *Ibid.* And finally, the Appellate Division of the New York Supreme Court is authorized in its discretion to "consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant," even if not previously objected to. § 470.15 (1). See, *e. g., People* v. *Fragale,* 60 App. Div. 2d 972, 401 N. Y. S. 2d 629 (1978); *People* v. *Travison,* 59 App. Div. 2d 404, 408, 400 N. Y. S. 2d 188, 191 (1977).

imposed.[9] Moreover, even if New York's contemporaneous-objection rule did generally bar the type of postverdict insufficiency claim that respondents made, there are at least two judicially created exceptions to that rule that might nonetheless apply in this case.[10]

[9] *E. g., People* v. *Ramos,* 33 App. Div. 2d 344, 308 N. Y. S. 2d 195 (1970); *People* v. *Walker,* 26 Misc. 2d 940, 206 N. Y. S. 2d 377 (1960). Cf. Fed. Rule Crim. Proc. 29 (c) ("It shall not be necessary to the making of [a motion for judgment of acquittal] that a similar motion has been made prior to the submission of the case to the jury"); *Burks* v. *United States,* 437 U. S. 1, 17–18 (under federal law a post-trial motion for a new trial based on insufficiency of the evidence is not a waiver of the right to acquittal at that point if the evidence is found to be insufficient).

[10] First, the New York Court of Appeals has developed an exception to the State's contemporaneous-objection policy that allows review of unobjected-to errors that affect "a fundamental constitutional right." *People* v. *McLucas,* 15 N. Y. 2d 167, 172, 204 N. E. 2d 846, 848 (1965). Accord, *People* v. *Arthur,* 22 N. Y. 2d 325, 239 N. E. 2d 537 (1968); *People* v. *DeRenzzio,* 19 N. Y. 2d 45, 224 N. E. 2d 97 (1966). Indeed, this Court recognized that exception in concluding that an ambiguously presented federal claim had been properly raised in New York trial and appellate courts and was therefore cognizable by this Court on appeal. *Street* v. *New York,* 394 U. S. 576, 583–584. Although this exception has been narrowed more recently, *e. g., People* v. *Robinson,* 36 N. Y. 2d 224, 326 N. E. 2d 784 (1975), it continues to have currency within the State where there has been a denial of a "fair trial." *E. g., La Rocca* v. *Lane,* 37 N. Y. 2d 575, 584, 338 N. E. 2d 606, 613 (1975); *People* v. *Bennett,* 29 N. Y. 2d 462, 467, 280 N. E. 2d 637, 639 (1972); *People* v. *White,* 86 Misc. 2d 803, 809, 383 N. Y. S. 2d 800, 804 (1976). The relevance of this exception is apparent from the Second Circuit opinion in this case which held that respondents "were denied a fair trial when the jury was charged that they could rely on the presumption . . . ." 568 F. 2d, at 1011.

Second, the New York courts will also entertain a federal constitutional claim on appeal even though it was not expressly raised at trial if a similar claim seeking similar relief *was* clearly raised. *E. g., People* v. *De Bour,* 40 N. Y. 2d 210, 214–215, 352 N. E. 2d 562, 565–566 (1976); *People* v. *Robbins,* 38 N. Y. 2d 913, 346 N. E. 2d 815 (1976); *People* v. *Arthur, supra.* Cf. *United States* v. *Mauro,* 436 U. S. 340, 364–365 (failure to invoke Interstate Agreement on Detainers time limit in a speedy trial motion is not a waiver of the former argument). In this case, respondents made two arguments based on the unavailability of the presumption and the conse-

The conclusion that the New York courts did not rely on a state procedural ground in rejecting respondents' constitutional claim is supported, not only by the probable unavailability in New York law of any such ground, but also by three aspects of this record. First, the prosecution never argued to any state court that a procedural default had occurred. This omission surely suggests that the New York courts were not thinking in procedural terms when they decided the issue. Indeed, the parties did not even apprise the appellate courts of the timing of respondents' objection to the presumption; a procedural default would not have been discovered, therefore, unless those courts combed the transcript themselves. If they did so without any prompting from the parties and based their decision on what they found, they surely would have said so.

Second, the trial court ruled on the merits when it denied respondents' motion to set aside the verdict. Tr. 775–776. Because it was not authorized to do so unless the issue was preserved for appeal, the trial court implicitly decided that

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quent total absence, in their view, of proof of the crime. The first, that the statutory "upon the person" exception to the presumption should apply in this case, was made in the middle of trial at the close of the prosecutor's case and then repeated at the close of the defendants' case. Tr. 554–590; App. 12a–17a. Indeed, respondents arguably made this claim even earlier, during the middle of the government's case, when they unsuccessfully objected to the introduction of the handguns in evidence on the ground that there was "nothing [in the record up to that point] to connect this weapon with the . . . defendants." Tr. 474–502. Although the constitutional counterpart to this argument was not made until just after the verdict was announced, the earlier objection to the State's reliance on the presumption might suffice under these cases as an adequate contemporaneous objection. See N. Y. Crim. Proc. Law § 470.05 (2) (McKinney 1971); n. 8, *supra*. The logical linkage between the two objections is suggested by legislative history and case law in New York indicating that the "upon the person" exception was included in the presumption statute to avoid constitutional problems. See *People* v. *Logan*, 94 N. Y. S. 2d 681, 684 (Sup. Ct., 1949); Report of the New York State Joint Legislative Committee on Firearms and Ammunition, N. Y. Leg. Doc. No. 29, p. 21 (1962).

there was no procedural default.[11] The most logical inference to be drawn from the Appellate Division's unexplained affirmance is that that court accepted not only the judgment but also the reasoning of the trial court.

Third, it is apparent on careful examination that the New York Court of Appeals did not ignore respondents' constitutional claim in its opinion. Instead, it summarily rejected the claim on its merits. That court had been faced with the issue in several prior cases and had always held the presumption constitutional. Indeed, the State confined its brief on the subject in the Court of Appeals to a string citation of some of those cases. Respondent's Brief in the Court of Appeals, p. 9. It is not surprising, therefore, that the Court of Appeals confined *its* discussion of the issue to a reprise of the explanation that its prior cases have traditionally given for the statute in holding it constitutional and a citation of two of those cases. 40 N. Y. 2d, at 509–511, 354 N. E. 2d, at 839–840, citing *People* v. *McCaleb*, 25 N. Y. 2d 394, 255 N. E. 2d 136 (1969); *People* v. *Leyva*, 38 N. Y. 2d 160, 341 N. E. 2d 546 (1975). Although it omits the word "constitutional," the most logical interpretation of this discussion is that it was intended as a passing and summary disposition of an issue that had already been decided on numerous occasions. This interpretation is borne out by the fact that the dissenting members of the Court of Appeals unequivocally addressed the merits of the constitutional claim [12] and by the fact that three Second Circuit Judges, whose experience with New York

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[11] Section 330.30 (1) of the N. Y. Crim. Proc. Law (McKinney 1971) authorizes a trial court to grant a motion to set aside the verdict "[a]t any time after rendition of a verdict of guilty and before sentence" on "[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court."

[12] 40 N. Y. 2d, at 514–515, 354 N. E. 2d, at 842–843 (Wachtler, J., concurring and dissenting); *id.*, at 516, 354 N. E. 2d, at 843–844 (Fuchsberg, J., concurring and dissenting).

practice is entitled to respect, concluded that the State's highest court had decided the issue on its merits. 568 F. 2d, at 1000. See *Bishop* v. *Wood*, 426 U. S. 341, 345–346; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

Our conclusion that it was proper for the federal courts to address respondents' claim is confirmed by the policies informing the "adequate state ground" exception to habeas corpus jurisdiction. The purpose of that exception is to accord appropriate respect to the sovereignty of the States in our federal system. *Wainwright* v. *Sykes*, 433 U. S., at 88. But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim.[13]

II

Although 28 U. S. C. § 2254 authorizes the federal courts to entertain respondents' claim that they are being held in custody in violation of the Constitution, it is not a grant of power to decide constitutional questions not necessarily subsumed within that claim. Federal courts are courts of limited jurisdiction. They have the authority to adjudicate specific controversies between adverse litigants over which and over whom they have jurisdiction. In the exercise of that authority, they have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration. *E. g., New York Transit Authority* v. *Beazer*, 440 U. S. 568, 582–583.

A party has standing to challenge the constitutionality of

[13] Moreover, looking beyond its position as an adversary in this litigation, it is arguable that the State of New York will benefit from an authoritative resolution of the conflict between its own courts and the federal courts sitting in New York concerning the constitutionality of one of its statutes.

a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (and cases cited). A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. *Id.*, at 611–616. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. *E. g.*, *Gooding* v. *Wilson*, 405 U. S. 518, 520; *Dombrowski* v. *Pfister*, 380 U. S. 479, 486. That justification, of course, has no application to a statute that enhances the legal risks associated with riding in vehicles containing dangerous weapons.

In this case, the Court of Appeals undertook the task of deciding the constitutionality of the New York statute "on its face." Its conclusion that the statutory presumption was arbitrary rested entirely on its view of the fairness of applying the presumption in hypothetical situations—situations, indeed, in which it is improbable that a jury would return a conviction,[14] or that a prosecution would ever be insti-

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[14] Indeed, in this very case the permissive presumptions in § 265.15 (3) and its companion drug statute, N. Y. Penal Law § 220.25 (1) (McKinney Supp. 1978), were insufficient to persuade the jury to convict the defendants of possession of the loaded machinegun and heroin in the trunk of the car notwithstanding the supporting testimony that at least two of them had been seen transferring something into the trunk that morning. See n. 3, *supra*.

The hypothetical, even implausible, nature of the situations relied upon by the Court of Appeals is illustrated by the fact that there are no reported cases in which the presumption led to convictions in circumstances even remotely similar to the posited situations. In those occasional cases in which a jury has reached a guilty verdict on the basis of evidence insufficient to justify an inference of possession from presence, the New York appellate courts have not hesitated to reverse. *E. g.*, *People* v.

tuted.[15] We must accordingly inquire whether these respondents had standing to advance the arguments that the Court of Appeals considered decisive. An analysis of our prior cases indicates that the answer to this inquiry depends on the type of presumption that is involved in the case.

Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts. *E. g., Barnes* v. *United States,* 412 U. S. 837, 843–844; *Tot* v. *United States,* 319 U. S. 463, 467; *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 42. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. See *In re Winship,* 397 U. S. 358, 364; *Mullaney* v. *Wilbur,* 421 U. S., at 702–703, n. 31.

Scott, 53 App. Div. 2d 703, 384 N. Y. S. 2d 878 (1976); *People* v. *Garcia,* 41 App. Div. 2d 560, 340 N. Y. S. 2d 35 (1973).

In light of the improbable character of the situations hypothesized by the Court of Appeals, its facial analysis would still be unconvincing even were that type of analysis appropriate. This Court has never required that a presumption be accurate in every imaginable case. See *Leary* v. *United States,* 395 U. S., at 53.

[15] See n. 4, *supra,* and accompanying text. Thus, the assumption that it would be unconstitutional to apply the statutory presumption to a hitchhiker in a car containing a concealed weapon does not necessarily advance the constitutional claim of the driver of a car in which a gun was found on the front seat, or of other defendants in entirely different situations.

The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. See, *e. g., Barnes* v. *United States, supra,* at 840 n. 3. In that situation the basic fact may constitute prima facie evidence of the elemental fact. See, *e. g., Turner* v. *United States,* 396 U. S. 398, 402 n. 2. When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. *E. g., Barnes* v. *United States, supra,* at 845; *Turner* v. *United States, supra,* at 419–424. See also *United States* v. *Gainey,* 380 U. S. 63, 67–68, 69–70. Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. *E. g., Turner* v. *United States, supra,* at 401–402, and n. 1; *Leary* v. *United States,* 395 U. S. 6, 30; *United States* v. *Romano,* 382 U. S. 136, 137, and n. 4, 138, 143; *Tot* v. *United States, supra,* at 469.[16] In this situation, the Court

[16] This class of more or less mandatory presumptions can be subdivided into two parts: presumptions that merely shift the burden of production to

has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. *E. g., Turner* v. *United States, supra,* at 408–418; *Leary* v.

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the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution; and presumptions that entirely shift the burden of proof to the defendant. The mandatory presumptions examined by our cases have almost uniformly fit into the former subclass, in that they never totally removed the ultimate burden of proof beyond a reasonable doubt from the prosecution. *E. g., Tot* v. *United States,* 319 U. S., at 469. See *Roviaro* v. *United States,* 353 U. S. 53, 63, describing the operation of the presumption involved in *Turner, Leary,* and *Romano.*

To the extent that a presumption imposes an extremely low burden of production—*e. g.,* being satisfied by "any" evidence—it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such. See generally *Mullaney* v. *Wilbur,* 421 U. S. 684, 703 n. 31.

In deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it. *Turner* v. *United States* provides a useful illustration of the different types of presumptions. It analyzes the constitutionality of two different presumption statutes (one mandatory and one permissive) as they apply to the basic fact of possession of both heroin and cocaine, and the presumed facts of importation and distribution of narcotic drugs. The jury was charged essentially in the terms of the two statutes.

The importance of focusing attention on the precise presentation of the presumption to the jury and the scope of that presumption is illustrated by a comparison of *United States* v. *Gainey,* 380 U. S. 63, with *United States* v. *Romano.* Both cases involved statutory presumptions based on proof that the defendant was present at the site of an illegal still. In *Gainey* the Court sustained a conviction "for carrying on" the business of the distillery in violation of 26 U. S. C. § 5601 (a)(4), whereas in *Romano,* the Court set aside a conviction for being in "possession, or custody, or . . . control" of such a distillery in violation of § 5601 (a)(1). The difference in outcome was attributable to two important differences between the cases. Because the statute involved in *Gainey* was a sweeping prohibition of almost any activity associated with the still, whereas the *Romano* statute involved only one narrow aspect of the total

United States, supra, at 45–52; *United States* v. *Romano, supra,* at 140–141; *Tot* v. *United States,* 319 U. S., at 468. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases.[17] It is for this reason that the

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undertaking, there was a much higher probability that mere presence could support an inference of guilt in the former case than in the latter.

Of perhaps greater importance, however, was the difference between the trial judge's instructions to the jury in the two cases. In *Gainey,* the judge had explained that the presumption was permissive; it did not require the jury to convict the defendant even if it was convinced that he was present at the site. On the contrary, the instructions made it clear that presence was only " 'a circumstance to be considered along with all the other circumstances in the case.' " As we emphasized, the "jury was thus specifically told that the statutory inference was not conclusive." 380 U. S., at 69–70. In *Romano,* the trial judge told the jury that the defendant's presence at the still " 'shall be deemed sufficient evidence to authorize conviction.' " 382 U. S., at 138. Although there was other evidence of guilt, that instruction authorized conviction even if the jury disbelieved all of the testimony except the proof of presence at the site. This Court's holding that the statutory presumption could not support the *Romano* conviction was thus dependent, in part, on the specific instructions given by the trial judge. Under those instructions it was necessary to decide whether, regardless of the specific circumstances of the particular case, the statutory presumption adequately supported the guilty verdict.

[17] In addition to the discussion of *Romano* in n. 16, *supra,* this point is illustrated by *Leary* v. *United States.* In that case, Dr. Timothy Leary, a professor at Harvard University, was stopped by customs inspectors in Laredo, Tex., as he was returning from the Mexican side of the international border. Marihuana seeds and a silver snuffbox filled with semirefined marihuana and three partially smoked marihuana cigarettes were discovered in his car. He was convicted of having knowingly transported marihuana which he knew had been illegally imported into this country in violation of 21 U. S. C. § 176a (1964 ed.). That statute included a mandatory presumption: "possession shall be deemed sufficient evidence to authorize conviction [for importation] unless the defend-

Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction. *E. g., Turner* v. *United States,* 396 U. S., at 407; *Leary* v. *United States,* 395 U. S., at 31–32; *United States* v. *Romano,* 382 U. S., at 138–139.

Without determining whether the presumption in this case was mandatory,[18] the Court of Appeals analyzed it on its face as if it were. In fact, it was not, as the New York Court of Appeals had earlier pointed out. 40 N. Y. 2d, at 510–511, 354 N. E. 2d, at 840.

The trial judge's instructions make it clear that the presumption was merely a part of the prosecution's case,[19] that

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ant explains his possession to the satisfaction of the jury." Leary admitted possession of the marihuana and claimed that he had carried it from New York to Mexico and then back.

Mr. Justice Harlan for the Court noted that under one theory of the case, the jury could have found direct proof of all of the necessary elements of the offense without recourse to the presumption. But he deemed that insufficient reason to affirm the conviction because under another theory the jury might have found knowledge of importation on the basis of either direct evidence or the presumption, and there was accordingly no certainty that the jury had not relied on the presumption. 395 U. S., at 31–32. The Court therefore found it necessary to test the presumption against the Due Process Clause. Its analysis was facial. Despite the fact that the defendant was well educated and had recently traveled to a country that is a major exporter of marihuana to this country, the Court found the presumption of knowledge of importation from possession irrational. It did so, not because Dr. Leary was unlikely to know the source of the marihuana, but instead because "a majority of possessors" were unlikely to have such knowledge. *Id.,* at 53. Because the jury had been instructed to rely on the presumption even if it did not believe the Government's direct evidence of knowledge of importation (unless, of course, the defendant met his burden of "satisfying" the jury to the contrary), the Court reversed the conviction.

[18] Indeed, the court never even discussed the jury instructions.

[19] "It is your duty to consider all the testimony in this case, to weigh it carefully and to test the credit to be given to a witness by his apparent intention to speak the truth and by the accuracy of his memory to recon-

it gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal.[20] The judge explained that possession could be actual or constructive, but that constructive possession could not exist without the intent and ability to exercise control or dominion over the weapons.[21] He also carefully instructed the jury that

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cile, if possible, conflicting statements as to material facts and in such ways to try and get at the truth and to reach a verdict upon the evidence." Tr. 739–740.

"To establish the unlawful possession of the weapons, again the People relied upon the presumption and, in addition thereto, the testimony of Anderson and Lemmons who testified in their case in chief." *Id.*, at 744.

"Accordingly, you would be warranted in returning a verdict of guilt against the defendants or defendant if you find the defendants or defendant was in possession of a machine gun and the other weapons and that the fact of possession was proven to you by the People beyond a reasonable doubt, and an element of such proof is the reasonable presumption of illegal possession of a machine gun or the presumption of illegal possession of firearms, as I have just before explained to you." *Id.*, at 746.

[20] "Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

"In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced." *Id.*, at 743.

"The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of evidence in the case." *Id.*, at 760.

[21] "As so defined, possession means actual physical possession, just as having the drugs or weapons in one's hand, in one's home or other place under one's exclusive control, or constructive possession which may exist

there is a mandatory presumption of innocence in favor of the defendants that controls unless it, as the exclusive trier of fact, is satisfied beyond a reasonable doubt that the defendants possessed the handguns in the manner described by the judge.[22] In short, the instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference that all four occupants of the car had possession of the two loaded handguns and to decide the matter for itself without regard to how much evidence the defendants introduced.[23]

Our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on

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without personal dominion over the drugs or weapons but with the intent and ability to retain such control or dominion." *Id.*, at 742.

[22] "[Y]ou are the exclusive judges of all the questions of fact in this case. That means that you are the sole judges as to the weight to be given to the evidence and to the weight and probative value to be given to the testimony of each particular witness and to the credibility of any witness." *Id.*, at 730.

"Under our law, every defendant in a criminal trial starts the trial with the presumption in his favor that he is innocent, and this presumption follows him throughout the entire trial and remains with him until such time as you, by your verdict, find him or her guilty beyond a reasonable doubt or innocent of the charge. If you find him or her not guilty, then, of course, this presumption ripens into an established fact. On the other hand, if you find him or her guilty, then this presumption has been overcome and is destroyed." *Id.*, at 734.

"Now, in order to find any of the defendants guilty of the unlawful possession of the weapons, the machine gun, the .45 and the .38, you must be satisfied beyond a reasonable doubt that the defendants possessed the machine gun and the .45 and the .38, possessed it as I defined it to you before." *Id.*, at 745.

[23] The verdict announced by the jury clearly indicates that it understood its duty to evaluate the presumption independently and to reject it if it was not supported in the record. Despite receiving almost identical instructions on the applicability of the presumption of possession to the contraband found in the front seat and in the trunk, the jury convicted all four defendants of possession of the former but acquitted all of them of possession of the latter. See n. 14, *supra*.

an evaluation of the presumption as applied to the record before the Court. None suggests that a court should pass on the constitutionality of this kind of statute "on its face." It was error for the Court of Appeals to make such a determination in this case.

III

As applied to the facts of this case, the presumption of possession is entirely rational. Notwithstanding the Court of Appeals' analysis, respondents were not "hitchhikers or other casual passengers," and the guns were neither "a few inches in length" nor "out of [respondents'] sight." See n. 4, *supra*, and accompanying text. The argument against possession by any of the respondents was predicated solely on the fact that the guns were in Jane Doe's pocketbook. But several circumstances—which, not surprisingly, her counsel repeatedly emphasized in his questions and his argument, *e. g.*, Tr. 282–283, 294–297, 306—made it highly improbable that she was the sole custodian of those weapons.

Even if it was reasonable to conclude that she had placed the guns in her purse before the car was stopped by police, the facts strongly suggest that Jane Doe was not the only person able to exercise dominion over them. The two guns were too large to be concealed in her handbag.[24] The bag was consequently open, and part of one of the guns was in plain view, within easy access of the driver of the car and even, perhaps, of the other two respondents who were riding in the rear seat.[25]

Moreover, it is highly improbable that the loaded guns belonged to Jane Doe or that she was solely responsible for their being in her purse. As a 16-year-old girl in the company of three adult men she was the least likely of the four

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[24] Jane Doe's counsel referred to the .45-caliber automatic pistol as a "cannon." Tr. 306.

[25] The evidence would have allowed the jury to conclude either that the handbag was on the front floor or front seat.

to be carrying one, let alone two, heavy handguns. It is far more probable that she relied on the pocketknife found in her brassiere for any necessary self-protection. Under these circumstances, it was not unreasonable for her counsel to argue and for the jury to infer that when the car was halted for speeding, the other passengers in the car anticipated the risk of a search and attempted to conceal their weapons in a pocketbook in the front seat. The inference is surely more likely than the notion that these weapons were the sole property of the 16-year-old girl.

Under these circumstances, the jury would have been entirely reasonable in rejecting the suggestion—which, incidentally, defense counsel did not even advance in their closing arguments to the jury [26]—that the handguns were in the sole possession of Jane Doe. Assuming that the jury did reject it, the case is tantamount to one in which the guns were lying on the floor or the seat of the car in the plain view of the three other occupants of the automobile. In such a case, it is surely rational to infer that each of the respondents was fully aware of the presence of the guns and had both the ability and the intent to exercise dominion and control over

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[26] Indeed, counsel for two of the respondents virtually invited the jury to find to the contrary:

"One more thing. You know, different people live in different cultures and different societies. You may think that the way [respondent] Hardrick has his hair done up is unusual; it may seem strange to you. People live differently. . . . For example, if you were living under their times and conditions and you traveled from a big city, Detroit, to a bigger city, New York City, *it is not unusual for people to carry guns, small arms to protect themselves, is it?* There are places in New York City policemen fear to go. But you have got to understand; you are sitting here as jurors. These are people, live flesh and blood, the same as you, different motives, different objectives." *Id.*, at 653–654 (emphasis added). See also *id.*, at 634.

It is also important in this regard that respondents passed up the opportunity to have the jury instructed not to apply the presumption if it determined that the handguns were "upon the person" of Jane Doe.

the weapons. The application of the statutory presumption in this case therefore comports with the standard laid down in *Tot* v. *United States*, 319 U. S., at 467, and restated in *Leary* v. *United States*, 395 U. S., at 36. For there is a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former.[27]

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[27] The New York Court of Appeals first upheld the constitutionality of the presumption involved in this case in *People* v. *Russo*, 303 N. Y. 673, 102 N. E. 2d 834 (1951). That decision relied upon the earlier case of *People* v. *Terra*, 303 N. Y. 332, 102 N. E. 2d 576 (1951), which upheld the constitutionality of another New York statute that allowed a jury to presume that the occupants of a room in which a firearm was located possessed the weapon. The analysis in *Terra*, the appeal in which this Court dismissed for want of a substantial federal question, 342 U. S. 938, is persuasive:

"[T]here can be no doubt about the 'sinister significance' of proof of a machine gun in a room occupied by an accused or about the reasonableness of the connection between its illegal possession and occupancy of the room where it is kept. Persons who occupy a room, who either reside in it or use it in the conduct and operation of a business or other venture—and that is what in its present context the statutory term 'occupying' signifies . . .—normally know what is in it; and, certainly, when the object is as large and uncommon as a machine gun, it is neither unreasonable nor unfair to presume that the room's occupants are aware of its presence. That being so, the legislature may not be considered arbitrary if it acts upon the presumption and erects it into evidence of a possession that is 'conscious' and 'knowing.'" 303 N. Y., at 335–336, 102 N. E. 2d, at 578–579.

See also Interim Report of Temporary State Commission to Evaluate the Drug Laws, N. Y. Leg. Doc. No. 10, p. 69 (1972), in which the drafters of the analogous automobile/narcotics presumption in N. Y. Penal Law § 220.25 (McKinney Supp. 1978), explained the basis for that presumption:

"We believe, and find, that it is rational and logical to presume that all occupants of a vehicle are aware of, and culpably involved in, possession of dangerous drugs found abandoned or secreted in a vehicle when the quantity of the drug is such that it would be extremely unlikely for an occupant to be unaware of its presence. . . .

"We do not believe that persons transporting dealership quantities of contraband are likely to go driving about with innocent friends or that

Respondents argue, however, that the validity of the New York presumption must be judged by a "reasonable doubt" test rather than the "more likely than not" standard employed in *Leary*.[28] Under the more stringent test, it is argued that a statutory presumption must be rejected unless the evidence necessary to invoke the inference is sufficient for a rational jury to find the inferred fact beyond a reasonable doubt. See *Barnes* v. *United States*, 412 U. S., at 842–843. Respondents' argument again overlooks the distinction between a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense.[29]

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they are likely to pick up strangers. We do not doubt that this can and does in fact occasionally happen, but because we find it more reasonable to believe that the bare presence in the vehicle is culpable, we think it reasonable to presume culpability in the direction which the proven facts already point. Since the presumption is an evidentiary one, it may be offset by any evidence, including the testimony of the defendant, which would negate the defendant's culpable involvement."

Legislative judgments such as this one deserve respect in assessing the constitutionality of evidentiary presumptions. *E. g.*, *Leary* v. *United States*, 395 U. S., at 39; *United States* v. *Gainey*, 380 U. S., at 67.

[28] "The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36.

[29] The dissenting argument rests on the assumption that "the jury [may have] rejected all of the prosecution's evidence concerning the location and origin of the guns." *Post*, at 175–176. Even if that assumption were plausible, the jury was plainly told that it was free to disregard the presumption. But the dissent's assumption is not plausible; for if the jury rejected the testimony describing where the guns were found, it would necessarily also have rejected the only evidence in the record proving that the guns were found in the car. The conclusion that the jury attached significance to the particular location of the handguns follows inexorably from the acquittal on the charge of possession of the machinegun and heroin in the trunk.

In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. But in the former situation, the prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*.

The permissive presumption, as used in this case, satisfied the *Leary* test. And, as already noted, the New York Court of Appeals has concluded that the record as a whole was sufficient to establish guilt beyond a reasonable doubt.

The judgment is reversed.

So ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join fully in the Court's opinion reversing the judgment under review. In the necessarily detailed step-by-step analysis of the legal issues, the central and controlling facts of a case often can become lost. The "underbrush" of finely tuned legal analysis of complex issues tends to bury the facts.

On this record, the jury could readily have reached the same result without benefit of the challenged statutory presumption; here it reached what was rather obviously a compromise verdict. Even without relying on evidence that two people had been seen placing something in the car trunk shortly before respondents occupied it, and that a machinegun and a package of heroin were soon after found in that trunk, the jury apparently decided that it was enough to hold the passengers to knowledge of the two handguns which were in

such plain view that the officer could see them from outside the car. Reasonable jurors could reasonably find that what the officer could see from outside, the passengers within the car could hardly miss seeing. Courts have long held that in the practical business of deciding cases the factfinders, not unlike negotiators, are permitted the luxury of verdicts reached by compromise.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

I agree with the Court that there is no procedural bar to our considering the underlying constitutional question presented by this case. I am not in agreement, however, with the Court's conclusion that the presumption as charged to the jury in this case meets the constitutional requirements of due process as set forth in our prior decisions. On the contrary, an individual's mere presence in an automobile where there is a handgun does not even make it "more likely than not" that the individual possesses the weapon.

I

In the criminal law, presumptions are used to encourage the jury to find certain facts, with respect to which no direct evidence is presented, solely because other facts have been proved.[1] See, *e. g., Barnes* v. *United States*, 412 U. S. 837, 840 n. 3 (1973); *United States* v. *Romano*, 382 U. S. 136, 138 (1965). The purpose of such presumptions is plain: Like certain other jury instructions, they provide guidance for jurors' thinking in considering the evidence laid before them.

[1] Such encouragement can be provided either by statutory presumptions, see, *e. g.*, 18 U. S. C. § 1201 (b), or by presumptions created in the common law. See, *e. g., Barnes* v. *United States*, 412 U. S. 837 (1973). Unless otherwise specified, "presumption" will be used herein to refer to "permissible inferences," as well as to "true" presumptions. See F. James, Civil Procedure § 7.9 (1965).

Once in the juryroom, jurors necessarily draw inferences from the evidence—both direct and circumstantial. Through the use of presumptions, certain inferences are commended to the attention of jurors by legislatures or courts.

Legitimate guidance of a jury's deliberations is an indispensable part of our criminal justice system. Nonetheless, the use of presumptions in criminal cases poses at least two distinct perils for defendants' constitutional rights. The Court accurately identifies the first of these as being the danger of interference with "the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ante,* at 156. If the jury is instructed that it must infer some ultimate fact (that is, some element of the offense) from proof of other facts unless the defendant disproves the ultimate fact by a preponderance of the evidence, then the presumption shifts the burden of proof to the defendant concerning the element thus inferred.[2]

But I do not agree with the Court's conclusion that the only constitutional difficulty with presumptions lies in the danger of lessening the burden of proof the prosecution must bear. As the Court notes, the presumptions thus far reviewed by the Court have not shifted the burden of persuasion, see *ante,* at 157–159, n. 16; instead, they either have required only that the defendant produce some evidence to rebut the inference suggested by the prosecution's evidence, see *Tot* v. *United States,* 319 U. S. 463 (1943), or merely have been suggestions to the

[2] The Court suggests that presumptions that shift the burden of persuasion to the defendant in this way can be upheld provided that "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *Ante,* at 167. As the present case involves no shifting of the burden of persuasion, the constitutional restrictions on such presumptions are not before us, and I express no views on them.

It may well be that even those presumptions that do not shift the burden of persuasion cannot be used to prove an element of the offense, if the facts proved would not permit a reasonable mind to find the presumed fact beyond a reasonable doubt. My conclusion in Part II, *infra,* makes it unnecessary for me to address this concern here.

jury that it would be sensible to draw certain conclusions on the basis of the evidence presented.[3] See *Barnes* v. *United States, supra,* at 840 n. 3. Evolving from our decisions, therefore, is a second standard for judging the constitutionality of criminal presumptions which is based—not on the constitutional requirement that the State be put to its proof—but rather on the due process rule that when the jury is encouraged to make factual inferences, those inferences must reflect some valid general observation about the natural connection between events as they occur in our society.

This due process rule was first articulated by the Court in *Tot* v. *United States, supra,* in which the Court reviewed the constitutionality of § 2 (f) of the Federal Firearms Act. That statute provided in part that "possession of a firearm or ammunition by any . . . person [who has been convicted of a crime of violence] shall be presumptive evidence that such firearm or ammunition was shipped or transported [in interstate or foreign commerce]." As the Court interpreted the presumption, it placed upon a defendant only the obligation of presenting some exculpatory evidence concerning the origins of a firearm or ammunition, once the Government proved that the defendant had possessed the weapon and had been convicted of a crime of violence. Noting that juries must be permitted to infer from one fact the existence of another essential to guilt, "if reason and experience support the inference," 319 U. S., at 467, the Court concluded that under some circumstances juries may be guided in making these inferences by legislative or common-law presumptions, even though they

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[3] The Court suggests as the touchstone for its analysis a distinction between "mandatory" and "permissive" presumptions. See *ante,* at 157. For general discussions of the various forms of presumptions, see Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325 (1979); F. James, Civil Procedure § 7.9 (1965). I have found no recognition in the Court's prior decisions that this distinction is important in analyzing presumptions used in criminal cases. Cf. *ibid.* (distinguishing true "presumptions" from "permissible inferences").

may be based "upon a view of relation broader than that a jury might take in a specific case," *id.*, at 468. To provide due process, however, there must be at least a "rational connection between the fact proved and the ultimate fact presumed"—a connection grounded in "common experience." *Id.*, at 467–468. In *Tot*, the Court found that connection to be lacking.[4]

Subsequently, in *Leary* v. *United States*, 395 U. S. 6 (1969), the Court reaffirmed and refined the due process requirement of *Tot* that inferences specifically commended to the attention of jurors must reflect generally accepted connections between related events. At issue in *Leary* was the constitutionality of a federal statute making it a crime to receive, conceal, buy, or sell marihuana illegally brought into the United States, knowing it to have been illegally imported. The statute provided that mere possession of marihuana "shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." After reviewing the Court's decisions in *Tot* v. *United States*, *supra*, and other criminal presumption cases, Mr. Justice Harlan, writing for the Court, concluded "that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36 (footnote omitted). The Court invalidated the statute, finding there to be insufficient basis in fact for the conclusion that those who possess marihuana are more likely than not to know that it was imported illegally.[5]

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[4] The analysis of *Tot* v. *United States* was used by the Court in *United States* v. *Gainey*, 380 U. S. 63 (1965), and *United States* v. *Romano*, 382 U. S. 136 (1965).

[5] Because the statute in *Leary* v. *United States* was found to be unconstitutional under the "more likely than not" standard, the Court explicitly declined to consider whether criminal presumptions also must follow

Most recently, in *Barnes* v. *United States*, we considered the constitutionality of a quite different sort of presumption—one that suggested to the jury that "'[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference . . . that the person in possession knew the property had been stolen.'" 412 U. S., at 840 n. 3. After reviewing the various formulations used by the Court to articulate the constitutionally required basis for a criminal presumption, we once again found it unnecessary to choose among them. As for the presumption suggested to the jury in *Barnes*, we found that it was well founded in history, common sense, and experience, and therefore upheld it as being "clearly sufficient to enable the jury to find beyond a reasonable doubt" that those in the unexplained possession of recently stolen property know it to have been stolen. *Id.*, at 845.

In sum, our decisions uniformly have recognized that due process requires more than merely that the prosecution be put to its proof.[6] In addition, the Constitution restricts the court in its charge to the jury by requiring that, when particular factual inferences are recommended to the jury, those factual inferences be accurate reflections of what history, common sense, and experience tell us about the relations between events in our society. Generally, this due process rule has been articulated as requiring that the truth of the inferred fact be more likely than not whenever the premise for the inference is true. Thus, to be constitutional a presumption must be at least more likely than not true.

"beyond a reasonable doubt" from their premises, if an essential element of the crime depends upon the presumption's use. 395 U. S., at 36 n. 64. See n. 2, *supra*. The Court similarly avoided this question in *Turner* v. *United States*, 396 U. S. 398, 416 (1970).

[6] The Court apparently disagrees, contending that "the factfinder's responsibility . . . to find the ultimate facts beyond a reasonable doubt" is the only constitutional restraint upon the use of criminal presumptions at trial. See *ante*, at 156.

II

In the present case, the jury was told:

> "Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession. In other words, [under] these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced."

Undeniably, the presumption charged in this case encouraged the jury to draw a particular factual inference regardless of any other evidence presented: to infer that respondents possessed the weapons found in the automobile "upon proof of the presence of the machine gun and the hand weapon" and proof that respondents "occupied the automobile at the time such instruments were found." I believe that the presumption thus charged was unconstitutional because it did not fairly reflect what common sense and experience tell us about passengers in automobiles and the possession of handguns. People present in automobiles where there are weapons simply are not "more likely than not" the possessors of those weapons.

Under New York law, "to possess" is "to have physical possession or otherwise to exercise dominion or control over tangible property." N. Y. Penal Law § 10.00 (8) (McKinney 1975). Plainly, the mere presence of an individual in an automobile—without more—does not indicate that he exercises "dominion or control over" everything within it. As the

Court of Appeals noted, there are countless situations in which individuals are invited as guests into vehicles the contents of which they know nothing about, much less have control over. Similarly, those who invite others into their automobile do not generally search them to determine what they may have on their person; nor do they insist that any handguns be identified and placed within reach of the occupants of the automobile. Indeed, handguns are particularly susceptible to concealment and therefore are less likely than are other objects to be observed by those in an automobile.

In another context, this Court has been particularly hesitant to infer possession from mere presence in a location, noting that "[p]resence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the [illegal] still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary . . . .' *Tot v. United States*, 319 U. S. 463, 467." *United States* v. *Romano*, 382 U. S., at 141. We should be even more hesitant to uphold the inference of possession of a handgun from mere presence in an automobile, in light of common experience concerning automobiles and handguns. Because the specific factual inference recommended to the jury in this case is not one that is supported by the general experience of our society. I cannot say that the presumption charged is "more likely than not" to be true. Accordingly, respondents' due process rights were violated by the presumption's use.

As I understand it, the Court today does not contend that in general those who are present in automobiles are more likely than not to possess any gun contained within their vehicles. It argues, however, that the nature of the presumption here involved requires that we look, not only to the immediate facts upon which the jury was encouraged to base its inference, but to the other facts "proved" by the prosecution

as well. The Court suggests that this is the proper approach when reviewing what it calls "permissive" presumptions because the jury was urged "to consider all the circumstances tending to support or contradict the inference." *Ante*, at 162.

It seems to me that the Court mischaracterizes the function of the presumption charged in this case. As it acknowledges was the case in *Romano, supra*, the "instruction authorized conviction even if the jury disbelieved all of the testimony except the proof of presence" in the automobile.[7] *Ante*, at 159 n. 16. The Court nevertheless relies on all of the evidence introduced by the prosecution and argues that the "permissive" presumption could not have prejudiced defendants. The possibility that the jury disbelieved all of this evidence, and relied on the presumption, is simply ignored.

I agree that the circumstances relied upon by the Court in determining the plausibility of the presumption charged in this case would have made it reasonable for the jury to "infer that each of the respondents was fully aware of the presence of the guns and had both the ability and the intent to exercise dominion and control over the weapons." But the jury was told that it could conclude that respondents possessed the weapons found therein from proof of the mere fact of respondents' presence in the automobile. For all we know, the jury rejected all of the prosecution's evidence

[7] In commending the presumption to the jury, the court gave no instruction that would have required a finding of possession to be based on anything more than mere presence in the automobile. Thus, the jury was not instructed that it should infer that respondents possessed the handguns only if it found that the guns were too large to be concealed in Jane Doe's handbag, *ante*, at 163; that the guns accordingly were in the plain view of respondents, *ibid;* that the weapons were within "easy access of the driver of the car and even, perhaps, of the other two respondents who were riding in the rear seat," *ibid.;* that it was unlikely that Jane Doe was solely responsible for the placement of the weapons in her purse, *ibid.;* or that the case was "tantamount to one in which the guns were lying on the floor or the seat of the car in the plain view of the three other occupants of the automobile." *Ante*, at 164.

concerning the location and origin of the guns, and based its conclusion that respondents possessed the weapons solely upon its belief that respondents had been present in the automobile.[8] For purposes of reviewing the constitutionality of the presumption at issue here, we must assume that this was the case. See *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1946); cf. *Leary* v. *United States*, 395 U. S., at 31.

The Court's novel approach in this case appears to contradict prior decisions of this Court reviewing such presumptions. Under the Court's analysis, whenever it is determined that an inference is "permissive," the only question is whether, in light of all of the evidence adduced at trial, the inference recommended to the jury is a reasonable one. The Court has never suggested that the inquiry into the rational basis of a permissible inference may be circumvented in this manner. Quite the contrary, the Court has required that the "evidence *necessary to invoke the inference* [be] sufficient for a rational juror to find the inferred fact . . . ." *Barnes* v. *United States*, 412 U. S., at 843 (emphasis supplied). See *Turner* v. *United States*, 396 U. S. 398, 407 (1970). Under the presumption charged in this case, the only evidence necessary to invoke the inference was the presence of the weapons in the automobile with respondents—an inference that is plainly irrational.

[8] The Court is therefore mistaken in its conclusion that, because "respondents were not 'hitchhikers or other casual passengers,' and the guns were neither 'a few inches in length' nor 'out of [respondents'] sight,'" reference to these possibilities is inappropriate in considering the constitutionality of the presumption as charged in this case. *Ante*, at 163. To be sure, respondents' challenge is to the presumption as charged to the jury in this case. But in assessing its application here, we are not free, as the Court apparently believes, to disregard the possibility that the jury may have disbelieved all other evidence supporting an inference of possession. The jury may have concluded that respondents—like hitchhikers—had only an incidental relationship to the auto in which they were traveling, or that, contrary to some of the testimony at trial, the weapons were indeed out of respondents' sight.

In sum, it seems to me that the Court today ignores the teaching of our prior decisions. By speculating about what the jury may have done with the factual inference thrust upon it, the Court in effect assumes away the inference altogether, constructing a rule that permits the use of any inference—no matter how irrational in itself—provided that otherwise there is sufficient evidence in the record to support a finding of guilt. Applying this novel analysis to the present case, the Court upholds the use of a presumption that it makes no effort to defend in isolation. In substance, the Court—applying an unarticulated harmless-error standard—simply finds that the respondents were guilty as charged. They may well have been, but rather than acknowledging this rationale, the Court seems to have made new law with respect to presumptions that could seriously jeopardize a defendant's right to a fair trial. Accordingly, I dissent.

UNITED STATES *v.* ADDONIZIO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–156. Argued March 27, 1979—Decided June 4, 1979

Held: A federal prisoner's allegation that a postsentencing change in the policies of the United States Parole Commission has prolonged his actual imprisonment beyond the period intended by the sentencing judge will not support a collateral attack on the original sentence under 28 U. S. C. § 2255. Pp. 184–190.

(a) The claimed error that the judge was incorrect in his assumptions about the future course of parole proceedings does not meet any of the established standards of collateral attack, where there is no claim of a constitutional violation, the sentence imposed was within the statutory limits, and the proceeding was not infected with any error of fact or law of a "fundamental" character that renders the entire proceeding irregular and invalid. The change in Parole Commission policies involved here—considering the seriousness of the offense as a significant factor in determining whether a prisoner should be granted parole—affected the way in which the court's judgment and sentence would be performed but did not affect the lawfulness of the judgment itself, then or now; and there is no claim that the action taken by the sentencing judge was unconstitutional or was based on misinformation of constitutional magnitude. *Davis* v. *United States*, 417 U. S. 333, and *United States* v. *Tucker*, 404 U. S. 443, distinguished. Pp. 184–187.

(b) There is no basis for enlarging the grounds for collateral attack to include claims based not on any objectively ascertainable error but on the frustration of the subjective intent of the sentencing judge. Under the present statutory scheme, the judge has no enforceable expectations with respect to the actual release of a sentenced defendant short of his statutory term; and while the judge may have expectations as to when release is likely, the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met. To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would substantially undermine the congressional decision to entrust release determinations to the Commission, not the courts, and nothing in § 2255 supports—let alone mandates—such a frustration of congressional intent. Thus, subsequent

actions taken by the Parole Commission—whether or not such actions accord with a trial judge's expectations at the time of sentencing—do not retroactively affect the validity of the final judgment itself, and do not provide a basis for collateral attack on the sentence pursuant to § 2255. Pp. 187–190.

573 F. 2d 147, reversed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the decision of the case, and POWELL, J., who took no part in the consideration or decision of the case.

Deputy Solicitor General Easterbrook argued the cause for the United States. With him on the briefs were *Solicitor General McCree* and *Assistant Attorney General Heymann.*

Michael Edelson argued the cause and filed a brief for respondent Addonizio. *Leon J. Greenspan* argued the cause for respondents Whelan and Flaherty. With him on the brief was *Joseph D. DeSalvo.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

Three prisoners have alleged that a postsentencing change in the policies of the United States Parole Commission has prolonged their actual imprisonment beyond the period intended by the sentencing judge. The question presented is whether this type of allegation will support a collateral attack on the original sentence under 28 U. S. C. § 2255.[1] We hold that it will not.

**Kenneth N. Flaxman* filed a brief for the Lewisburg Prison Project as *amicus curiae* urging affirmance.

[1] Title 28 U. S. C. § 2255 provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or

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With respect to the legal issue presented, the claims before us are identical. To bring this issue into sharp focus, we accept for purposes of decision Addonizio's view of the facts and the relevant aspects of the Parole Commission's practices.

After his conviction in the United States District Court for the District of New Jersey, on September 22, 1970, Addonizio was sentenced to 10 years' imprisonment and a fine of $25,000. Factors which led the District Judge to impose that sentence included the serious character of Addonizio's offenses,[2] and the judge's expectation that exemplary institu-

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is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

. . . . . .

"If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

[2] At the time he imposed sentence, Judge Barlow stated:

"Weighed against these virtues, [Mr. Addonizio's record of public service] . . . is his conviction by a jury in this court of crimes of monumental proportion, the enormity of which can scarcely be exaggerated and the commission of which create the gravest implications for our form of government.

"Mr. Addonizio, and the other defendants here, have been convicted of one count of conspiring to extort and 63 substantive counts of extorting hundreds of thousands of dollars from persons doing business with the City of Newark. An intricate conspiracy of this magnitude, I suggest to you, Mr. Hellring [defense counsel], could have never succeeded without the then-Mayor Addonizio's approval and participation.

"These were no ordinary criminal acts. . . . These crimes for which Mr. Addonizio and the other defendants have been convicted represent a pattern of continuous, highly-organized, systematic criminal extortion over a period of many years, claiming many victims and touching many more lives.

"Instances of corruption on the part of elected and appointed govern-

tional behavior would lead to Addonizio's release when he became eligible for parole after serving one-third of his sentence.[3] The judge did not contemplate that the Parole Com-

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mental officials are certainly not novel to the law, but the corruption disclosed here, it seems to the Court, is compounded by the frightening alliance of criminal elements and public officials, and it is this very kind of totally destructive conspiracy that was conceived, organized and executed by these defendants.

". . . It is impossible to estimate the impact upon—and the cost of—these criminal acts to the decent citizens of Newark, and, indeed, to the citizens of the State of New Jersey, in terms of their frustration, despair and disillusionment.

. . . . . .

"Their crimes, in the judgment of this Court, tear at the very heart of our civilized form of government and of our society. The people will not tolerate such conduct at any level of government, and those who use their public office to betray the public trust in this manner can expect from the courts only the gravest consequences.

. . . . . .

"It is, accordingly, the sentence of this Court that the defendant Hugh J. Addonizio shall be committed to the custody of the Attorney General of the United States for a term of ten years, and that, additionally, the defendant Hugh J. Addonizio shall pay a fine of $25,000. That is all." 573 F. 2d 147, 154.

[3] In his opinion granting Addonizio relief under § 2255 in 1977, Judge Barlow stated:

"At the time sentence was imposed, this Court expected that petitioner would receive a meaningful parole hearing—that is, a determination based on his institutional record and the likelihood of recidivism—upon the completion of one-third (1/3) of his sentence. The Court anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that petitioner would be actually confined for a period of approximately three and one-half to four years of the ten-year sentence, in view of the fact that he was a first-offender and that there appeared to be little probability of recidivism, given the circumstances of the case and his personal and social history. This sentencing expectation was based on the Court's understanding—which was consistent with generally-held notions—of the operation of the parole system in 1970." App. to Pet. for Cert. 28a–29a (footnotes omitted).

mission might rely on the seriousness of the offense as a reason for refusing a parole which Addonizio would otherwise receive.

In 1973, the Parole Commission markedly changed its policies.[4] Under its new practices the gravity of the offense became a significant factor in determining whether a prisoner should be granted parole. Addonizio became eligible for parole on July 3, 1975. After hearings, the Parole Commission twice refused to release him, expressly basing its refusal on the serious character of his crimes.[5]

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[4] The Commission commenced using guidelines on a trial basis in 1972 and started to apply them throughout the Nation in November 1973. See 38 Fed. Reg. 31942 (1973). The Commission's present guidelines are codified at 28 CFR § 2.20 (1978). The use of guidelines is now required by statute. See 18 U. S. C. §§ 4203 (a) (1) and 4206 (a).

[5] As Judge Aldisert noted in his opinion for the Third Circuit, the comments made by the Parole Commission on January 13, 1977, explaining its denial of parole are remarkably similar to the reasons given by the trial judge at the time sentence was imposed. The Commission stated:

"Your offense behavior has been rated as very high severity. Your salient factor score is 11. You have been in custody a total of 57 months at time of hearing. Guidelines established by the Commission for adult cases which consider the above factors suggest a range of 26–36 months to be served before release for cases with good institutional adjustment. After careful consideration of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense was part of an ongoing criminal conspiracy lasting from 1965 to 1968, which consisted of many separate offenses committed by you and approximately 14 other co-conspirators. As the highest elected official in the City of Newark, you were convicted of an extortion conspiracy in which, under color of your official authority, you and your co-conspirators conspired to delay, impede, obstruct, and otherwise thwart construction in the City of Newark in order to obtain a percentage of contracts for the privilege of working on city construction projects.

"Because of the magnitude of this crime (money extorted totalling approximately $241,000) its economic effect on innocent citizens of Newark, and because the offense involved a serious breach of public trust over a substantial period of time, a decision above the guidelines is warranted. Parole at this time would depreciate the seriousness of the offense and promote disrespect for the law." 573 F. 2d, at 153–154.

Thereafter, Addonizio invoked the District Court's jurisdiction under 28 U. S. C. § 2255 and moved for resentencing. Following the Third Circuit's decision in *United States* v. *Salerno*, 538 F. 2d 1005, 1007 (1976), the District Court accepted jurisdiction, found that the Parole Commission had not given Addonizio the kind of "meaningful parole hearing" that the judge had anticipated when sentence was imposed, and reduced his sentence to the time already served. The judge stated that he had "anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that [Addonizio] would be actually confined for a period of approximately three and one-half to four years of the ten-year sentence." This "sentencing expectation" was frustrated by the Parole Commission's subsequent adoption of new standards and procedures.

The Court of Appeals affirmed. 573 F. 2d 147. Because of a conflict with the decision of the Ninth Circuit holding that § 2255 does not give district courts this type of resentencing authority,[6] we granted the Government's petition for certiorari in Addonizio's case and in the consolidated case of two other prisoners in which similar relief was granted.[7] 439 U. S. 1045.

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[6] *Bonanno* v. *United States*, 571 F. 2d 588 (CA9 1978), cert. dismissed, 439 U. S. 1136.

[7] *United States* v. *Whelan & Flaherty*. In that case, two federal prisoners filed motions under 28 U. S. C. §§ 2241 and 2255 challenging their confinement. The § 2241 motion was denied by the District Court; the Court of Appeals affirmed, 573 F. 2d 147, and the prisoners did not seek further review. In the § 2255 motion, which is at issue here, these respondents claimed that the Parole Commission's action frustrated the intent of Judge Shaw, who had originally sentenced them and who had since died. The case was assigned to Judge Biunno, who took the position that "the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious," 427 F. Supp. 379, 381, and concluded that it was not. The Court of Appeals vacated that decision and directed Judge Biunno to reconsider the case to determine whether Judge Shaw's sentencing intent had

II

We decide only the jurisdictional issue. We do not consider the Government's alternative argument that the significance of the changes in the Parole Commission's procedures has been exaggerated because it always attached some weight to the character of the offense in processing parole applications. Nor do we have any occasion to consider whether the new guidelines are consistent with the Parole Commission and Reorganization Act of 1976, 90 Stat. 219;[8] or whether their enforcement may violate the *Ex Post Facto* Clause of the Constitution.[9]

III

When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.[10] The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.[11] The question in this case is

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been frustrated. Proceedings on remand have resulted in the release of both respondents.

[8] See *Geraghty* v. *United States Parole Comm'n*, 579 F. 2d 238 (CA3 1978), cert. granted, 440 U. S. 945 (1979).

[9] See *Rodriguez* v. *United States Parole Comm'n*, 594 F. 2d 170 (CA7 1979).

[10] See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274 ("Of course the writ of *habeas corpus* should not do service for an appeal. . . . This rule must be strictly observed if orderly appellate procedure is to be maintained"); *Sunal* v. *Large*, 332 U. S. 174, 181–182; *Hill* v. *United States*, 368 U. S. 424.

[11] Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. See, *e. g.*, F. James, Civil Procedure 517–518 (1965). Moreover, increased volume of judicial work associated

whether an error has occurred that is sufficiently fundamental to come within those narrow limits.

Under § 2255, the sentencing court is authorized to discharge or resentence a defendant if it concludes that it "was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." This statute was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement, by providing an equally broad remedy in the more convenient jurisdiction of the sentencing court. *United States* v. *Hayman*, 342 U. S. 205, 216–217.

While the remedy is in this sense comprehensive, it does not encompass all claimed errors in conviction and sentencing. Habeas corpus has long been available to attack convictions and sentences entered by a court without jurisdiction. See, *e. g.*, *Ex parte Watkins*, 3 Pet. 193, 202–203 (Marshall, C. J.). In later years, the availability of the writ was expanded to encompass claims of constitutional error as well. See *Waley* v. *Johnston*, 316 U. S. 101, 104–105; *Brown* v. *Allen*, 344 U. S. 443. But unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited. *Stone* v. *Powell*, 428 U. S. 465, 477 n. 10. The Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill* v. *United States*, 368 U. S. 424, 428.

Similar limitations apply with respect to claimed errors of fact. The justification for raising such errors in a § 2255

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with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful. See *Stone* v. *Powell*, 428 U. S. 465, 491 n. 31; *Henderson* v. *Kibbe*, 431 U. S. 145, 154 n. 13.

proceeding, as *amicus* here points out,[12] is that traditionally they could have been raised by a petition for a writ of *coram nobis*, and thus fall within § 2255's provision for vacating sentences that are "otherwise subject to collateral attack." But *coram nobis* jurisdiction has never encompassed all errors of fact; instead, it was of a limited scope, existing "in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States* v. *Mayer*, 235 U. S. 55, 69. Thus, the writ of *coram nobis* was "available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment." *Id.*, at 68.

The claimed error here—that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack. There is no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the "fundamental" character that renders the entire proceeding irregular and invalid.

The absence of any error of this nature or magnitude distinguishes Addonizio's claim from those in prior cases, upon which he relies, in which collateral attacks were permitted. *Davis* v. *United States*, 417 U. S. 333, for example, like this case, involved a claim that a judgment that was lawful when it was entered should be set aside because of a later development. The subsequent development in that case, however, was a change in the substantive law that established that the

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[12] See Brief for Lewisburg Prison Project as *Amicus Curiae* 10–12.

conduct for which petitioner had been convicted and sentenced was lawful. To have refused to vacate his sentence would surely have been a "complete miscarriage of justice," since the conviction and sentence were no longer lawful. The change in Parole Commission policies involved in this case is not of the same character: this change affected the way in which the court's judgment and sentence would be performed but it did not affect the lawfulness of the judgment itself—then or now. Nor is *United States* v. *Tucker,* 404 U. S. 443, analogous to the present case. In that case, the Court ordered resentencing of a defendant whose original sentence had been imposed at least in part upon the basis of convictions secured without the assistance of counsel. But the error underlying the sentence in *Tucker,* as the Court emphasized, was "misinformation of constitutional magnitude." *Id.,* at 447. We have held that the constitutional right to the assistance of counsel is itself violated when uncounseled convictions serve as the basis for enhanced punishment. *Burgett* v. *Texas,* 389 U. S. 109, 115. Whether or not the Parole Commission action in this case was constitutional, a question not presented here, there is no claim that the action taken by the sentencing judge was unconstitutional, or was based on "misinformation of constitutional magnitude."

Our prior decisions, then, provide no support for Addonizio's claim that he is entitled to relief under § 2255. According to all of the objective criteria—federal jurisdiction, the Constitution, and federal law—the sentence was and is a lawful one. And in our judgment, there is no basis for enlarging the grounds for collateral attack to include claims based not on any objectively ascertainable error but on the frustration of the subjective intent of the sentencing judge.

As a practical matter, the subjective intent of the sentencing judge would provide a questionable basis for testing the validity of his judgment. The record made when Judge Barlow pronounced sentence against Addonizio, for example, is en-

tirely consistent with the view that the judge then thought that this was an exceptional case in which the severity of Addonizio's offense should and would be considered carefully by the Parole Commission when Addonizio became eligible for parole. If the record is ambiguous, and if a § 2255 motion is not filed until years later, it will often be difficult to reconstruct with any certainty the subjective intent of the judge at the time of sentencing. Regular attempts to do so may well increase the risk of inconsistent treatment of defendants; on the other hand, the implementation of the Parole Commission's policies may reduce that risk.

Nothing in the statutory scheme directs sentencing courts to engage in this task on collateral attack; quite to the contrary, the proposed system of sentencing review would be inconsistent with that established by Congress. The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission.[13] Whether

[13] A federal prisoner is entitled to release at the expiration of his maximum sentence less "good time" computed according to 18 U. S. C. § 4161. In addition, any prisoner sentenced to more than 5 years' imprisonment is entitled to be released on parole after serving two-thirds of each consecutive term or 30 years, whichever is first, unless the Commission determines that the prisoner "has seriously or frequently violated institution rules" or that there is a reasonable probability that he would commit further crimes. 18 U. S. C. § 4206 (d). The Commission has substantial discretion to determine whether a prisoner should be released on parole, once he is eligible, prior to the point where release is mandated by statute. Title 18 U. S. C. § 4203 (1970 ed.), in effect when Addonizio was sentenced, provided:

"If it appears to the Board . . . that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

Under the statute now in effect, 18 U. S. C. § 4206, the Commission is to consider the risk of recidivism and whether "release would . . . depreciate the seriousness of [the] offense or promote disrespect for the law."

wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges.[14] The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.[15] And once a sentence has been imposed, the trial judge's authority to modify it is also circumscribed. Federal Rule Crim. Proc. 35 now authorizes district courts to reduce a sentence within 120 days after it is imposed or after it has been affirmed on appeal.[16] The time period, however, is jurisdictional and may not be extended.[17]

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[14] See generally S. Conf. Rep. No. 94–648, p. 19 (1976).

[15] The trial court may set a defendant's eligibility for parole at any point up to one-third of the maximum sentence imposed, see 18 U. S. C. §§ 4205 (a), (b); 18 U. S. C. §§ 4202, 4208 (1970 ed.). Whether the defendant will actually be paroled at that time is the decision of the Parole Commission. See *United States* v. *Grayson*, 438 U. S. 41, 47 ("[T]he extent of a federal prisoner's confinement is initially determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on parole is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially-fixed term"). The trial judge is precluded from effectively usurping that function by splitting a lengthy sentence between a stated period of probation and imprisonment: probation may not be combined with a sentence entailing incarceration of more than six months. 18 U. S. C. § 3651.

[16] Prior to the adoption of Rule 35, the trial courts had no such authority. "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it." *United States* v. *Murray*, 275 U. S. 347, 358. This rule was applied even though the change related only to the second of a pair of consecutive sentences which itself was not being served at the time. *Affronti* v. *United States*, 350 U. S. 79.

[17] See Fed. Rule Crim. Proc. 45 (b); *United States* v. *Robinson*, 361 U. S. 220.

The import of this statutory scheme is clear: the judge has no enforceable expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met. To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would substantially undermine the congressional decision to entrust release determinations to the Commission and not the courts. Nothing in § 2255 supports—let alone mandates—such a frustration of congressional intent.

Accordingly, without reaching any question as to the validity of the Parole Commission's actions, either in promulgating its new guidelines or in denying Addonizio's applications for parole, we hold that subsequent actions taken by the Parole Commission—whether or not such actions accord with a trial judge's expectations at the time of sentencing—do not retroactively affect the validity of the final judgment itself. The facts alleged by the prisoners in these cases do not provide a basis for a collateral attack on their respective sentences pursuant to § 2255.

The judgments of the Court of Appeals are therefore reversed.

It is so ordered.

MR. JUSTICE BRENNAN took no part in the decision of this case.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

Syllabus

MARCHIORO ET AL. *v.* CHANEY ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 78-647. Argued March 26, 1979—Decided June 4, 1979

Held: A Washington statute that requires each major political party to have a State Committee consisting of two persons from each county in the State does not, by so restricting the composition of the State Committee, violate the rights of members of a political party to freedom of association protected by the First and Fourteenth Amendments insofar as concerns the Committee's activities involving purely internal party decisions. None of these activities—such as exercising the party's policy-making functions when the party's State Convention is in adjournment, directing the party's administrative apparatus, raising and distributing funds to party candidates, conducting workshops to instruct candidates on effective campaign procedures and organization, and seeking to further party objectives of influencing policy and electing its adherents to office—is required by statute to be performed by the Committee; instead, all of the "internal party decisions" are made by the Committee because of delegations of authority from the party's Convention itself. As far as the statutory scheme is concerned, there is no reason why the Convention—instead of attempting to increase the size of the State Committee by providing for the election of members in addition to those specified by the statute—could not create an entirely new separate committee or one, for example, composed of members of the State Committee and such additional membership as might be desired to perform the political functions now performed by the State Committee. Thus, there can be no complaint that the party's right to govern itself has been substantially burdened by statute when the source of the complaint is the party's own decision to confer critical authority on the State Committee. Pp. 195-199.

90 Wash. 2d 298, 582 P. 2d 487, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Charles A. Goldmark argued the cause and filed briefs for appellants.

Daniel Brink argued the cause for appellees. With him on the brief was *Winship A. Todd, Jr.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

Since 1927, a Washington statute has required each major political party to have a State Committee consisting of two persons from each county in the State.[1] The question pre-

[1] Washington Rev. Code § 29.42.020 (1976) provides:

"*State Committee.* The state committee of each major political party shall consist of one committeeman and one committeewoman from each county elected by the county committee at its organization meeting. It shall have a chairman and vice chairman who must be of opposite sexes. This committee shall meet during January of each odd-numbered year for the purpose of organization at a time and place designated by a sufficient notice to all the newly elected state committeemen and committeewomen by the authorized officers of the retiring committee. For the purpose of this section a notice mailed at least one week prior to the date of the meeting shall constitute sufficient notice. At its organizational meeting it shall elect its chairman and vice chairman, and such officers as its bylaws may provide, and adopt bylaws, rules and regulations. It shall have power to:

"(1) Call conventions at such time and place and under such circumstances and for such purposes as the call to convention shall designate. The manner, number and procedure for selection of state convention delegates shall be subject to the committee's rules and regulations duly adopted;

"(2) Provide for the election of delegates to national conventions;

"(3) Fill vacancies on the ticket for any federal or state office to be voted on by the electors of more than one county;

"(4) Provide for the nomination of presidential electors; and

"(5) Perform all functions inherent in such an organization.

"Notwithstanding any provision of this [1972 amendatory act], the committee shall not set rules which shall govern the conduct of the actual proceedings at a party state convention."

Between 1909 and 1927, the statute provided for one member to be elected from each county.

A "major political party" is defined as "a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year . . . ." Wash. Rev. Code § 29.01.090 (Supp. 1977).

sented by this appeal is whether the Washington Supreme Court correctly held that this statute does not violate the First Amendment of the United States Constitution.[2]

The powers of the Democratic State Committee are derived from two sources: the authorizing statute and the Charter of the Democratic Party of Washington. The statute gives the State Committee the power to call conventions, to provide for the election of delegates to national conventions and for the nomination of Presidential electors, and to fill vacancies on the party ticket.

The principal activities performed by the State Committee are authorized by the Charter of the Democratic Party of Washington. The Charter provides that the State Committee shall act as the party's governing body when the Convention is in adjournment.[3] And it gives the State Committee authority to organize and administer the party's administrative apparatus, to raise and distribute funds to candidates, to conduct workshops, to instruct candidates on effective campaign procedures and organization, and generally to further the party's objectives of influencing policy and electing its adherents to public office.[4]

Under both party rules and state law, the State Convention rather than the State Committee is the governing body of the party. The Charter explicitly provides that the Convention is "the highest policy-making authority within the

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[2] The First Amendment provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. *Williams* v. *Rhodes*, 393 U. S. 23, 30–31.

[3] Charter, Art. IV (G)(1), App. 10.

[4] Charter, Arts. IV (G)(1), (2), (5), App. 10–11; Charter, Art. VII (C)(1), App. 19.

State Democratic Party." [5] And the State Supreme Court has unequivocally held that the "state convention of a major political party is the ultimate repository of statewide party authority. . . . [T]he state convention is implicitly empowered to establish the permanent state organization of the party, create committees, delegate authority, and promulgate, adopt, ratify, amend, repeal or enforce intraparty statewide rules and regulations." [6]

In 1976, the State Democratic Convention adopted a Charter amendment directing that the State Committee include members other than those specified by state statute. The Charter amendment provided that in addition to the two delegates from each of the State's 39 counties, there should be one representative elected from each of the State's 49 legislative districts. Pursuant to this Charter amendment new legislative district representatives were elected to serve on the State Committee. At the January 1977 meeting of the State Committee, a motion to seat these newly elected representatives was ruled out of order, apparently in reliance on the statutory definition of the composition of the Committee.[7]

Thereafter, members and officers of the State Democratic Party, including four who had been elected as legislative district representatives, instituted this action for declaratory and injunctive relief in the King County Superior Court. Among their contentions was a claim that the statutory restriction on the composition of the Democratic State Committee violated their rights to freedom of association protected by the First and Fourteenth Amendments.[8]

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[5] Charter, Art. V (F)(5), App. 15.

[6] *King County Republican Central Committee* v. *Republican State Committee*, 79 Wash. 2d 202, 211–212, 484 P. 2d 387, 392 (1971). See also 90 Wash. 2d 298, 313, 582 P. 2d 487, 496 (1978) (case below).

[7] An appeal from that ruling was defeated by a vote of 56 to 17. App. 4–5.

[8] Appellants also challenged the requirement of Wash. Rev. Code

The Superior Court granted appellants' motion for a partial summary judgment. On appeal, a divided State Supreme Court reversed that part of the trial court's judgment that invalidated the statutory definition of the central Committee.[9] The state court reasoned that although " 'substantial burdens' " on the right to associate for political purposes are invalid unless " 'essential to serve a compelling state interest,' " [10] these appellants failed to establish that this statute had imposed any such burden on their attempts to achieve the objectives of the Democratic Party. Since this initial burden had not been met, the court upheld the constitutionality of the challenged statute.

We noted probable jurisdiction, 439 U. S. 1044, and now affirm the judgment of the Washington Supreme Court.

The requirement that political parties form central or county committees composed of specified representatives from each district is common in the laws of the States.[11] These

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§§ 29.42.020 and 29.42.030 (1976) that the two persons elected as county delegates be one man and one woman. Appellants argued that this requirement violates the Washington State Equal Rights Amendment, Wash. Const., Art. XXXI. The Washington Supreme Court rejected the claim, 90 Wash. 2d, at 308, 582 P. 2d, at 493. Appellants do not seek review here of the "one man and one woman" requirements of the statute. Nor do they raise any claim based on the Equal Protection Clause of the Fourteenth Amendment. See n. 12, *infra*.

[9] 90 Wash. 2d 298, 582 P. 2d 487 (1978).

[10] *Id.*, at 309, 582 P. 2d, at 493, quoting *Storer* v. *Brown*, 415 U. S. 724, 729.

[11] In 23 States, political parties are required by state law to establish state central committees composed of an equal number of committee members from each unit of representation. See Cal. Elec. Code Ann. §§ 8660, 9160 (West Supp. 1979); Fla. Stat. § 103.111 (1977); Idaho Code § 34–504 (Supp. 1978); Ind. Code § 3–1–2–1 (1976); Iowa Code § 43.111 (1979); Kan. Stat. Ann. § 25–3804 (Supp. 1978); Mass. Gen. Laws Ann., ch. 52, § 1 (West 1975); Mich. Comp. Laws § 168.597 (1970); Miss. Code Ann. § 23–1–3 (Supp. 1978); Mo. Rev. Stat. § 115.621 (1978); Mont. Rev. Codes Ann. § 23–3403 (Supp. 1977); Nev. Rev. Stat. § 293.153 (1975); N. J. Stat. Ann. § 19:5–4 (West Supp. 1979); N. D. Cent. Code § 16–17–

laws are part of broader election regulations that recognize the critical role played by political parties in the process of selecting and electing candidates for state and national office. The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer* v. *Brown*, 415 U. S. 724, 730. That interest is served by a state statute requiring that a representative central committee be established, and entrust-

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11 (1971); Ohio Rev. Code Ann. § 3517.03 (1972); S. C. Code § 7-9-90 (1976); S. D. Comp. Laws Ann. § 12-5-16 (1975); Tenn. Code Ann. § 2-1304 (Supp. 1978); Tex. Elec. Code Ann., Art. 13.38 (Vernon Supp. 1978); Vt. Stat. Ann., Tit. 17, § 730 (1968); Wash. Rev. Code § 29.42.020 (1976); W. Va. Code § 3-1-9 (1979); Wyo. Stat. §§ 22-4-105—22-4-110 (1977). Election laws in five States establish state party central committees in which the number of committee members from each unit of representation bears a rough relationship to party membership. See Ariz. Rev. Stat. Ann. § 16-233 (1975); Colo. Rev. Stat. § 1-14-108 (2) (Supp. 1976); La. Rev. Stat. Ann. § 18:285 (1) (West Supp. 1979); Ore. Rev. Stat. § 248.075 (1977); Utah Code Ann. § 20-4-2 (1976).

Political parties are required to establish county central committees comprised of an equal number of committee members from each unit of representation by state law in 21 States. See Cal. Elec. Code Ann. §§ 8820-8825, 9320-9325 (West 1977) (limited to certain counties); Colo. Rev. Stat. § 1-14-108 (1) (1973); Fla. Stat. § 103.111 (1977); Idaho Code § 34-502 (Supp. 1978); Ind. Code § 3-1-2-1 (1976); Kan. Stat. Ann. § 25-3802 (1973); La. Rev. Stat. Ann. § 18:285 (9) (West Supp. 1979); Md. Ann. Code, Art. 33, § 11-2 (Supp. 1978); Mass. Gen. Laws Ann., ch. 52, § 9 (West 1975); Mich. Comp. Laws § 168.599 (1970); Miss. Code Ann. § 23-1-3 (Supp. 1978); Mo. Rev. Stat. § 115.607 (1978); Mont. Rev. Codes Ann. §§ 23-3401, 23-3402 (Supp. 1977); N. J. Stat. Ann. § 19-5-3 (West Supp. 1979); Ohio Rev. Code Ann. § 3517.03 (1972); S. C. Code § 7-9-60 (1976); S. D. Comp. Laws Ann. §§ 12-5-13, 12-5-14 (1975); Tex. Elec. Code Ann., Art. 13.18 (Vernon Supp. 1978); Wash. Rev. Code § 29.42.030 (1976); W. Va. Code § 3-1-9 (1979); Wis. Stat. § 8.17 (1975). See Note, Equal Representation of Party Members on Political Party Central Committees, 88 Yale L. J. 167, 168-169, and nn. 5-6 (1978).

ing that committee with authority to perform limited functions, such as filling vacancies on the party ticket, providing for the nomination of Presidential electors and delegates to national conventions, and calling statewide conventions. Such functions are directly related to the orderly participation of the political party in the electoral process.

Appellants have raised no objection to the Committee's performance of these tasks.[12] Rather, it is the Committee's other activities—those involving "purely internal party decisions," Brief for Appellants 5 n. 11—that concern appellants and give rise to their constitutional attack on the statute.

The Committee does play a significant role in internal

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[12] Since appellants do not claim that these statutory requirements impose any impermissible burdens, we have no occasion to consider whether whatever burdens they do impose are justified by the legitimate state interests served by these requirements. By appellants' own admission, the Committee's electoral functions are performed rarely; moreover, when they are performed, they conform with the one-person, one-vote principle.

"Although the state committee on rare occasions performs certain ballot access functions, *see* RCW 29.18.150 and 29.42.020 (filling vacancies on certain party tickets and nominating presidential electors) and Wash. Const. art. II, § 15 (selecting nominees for certain interim legislative positions), when it does so it is constitutionally required to comply with the principle of one-person, one-vote. See, *e. g., Seergy v. Kings County Republican County Comm.*, 459 F. 2d 308, 313–14 (2d Cir. 1972); *Fahey v. Darigan*, 405 F. Supp. 1386, 1392 (D. R. I. 1975). The state committee has recognized this and has stipulated to the entry of an injunction ordering that the state committee be:

"enjoined from filling vacancies on the Democratic ticket for any federal or state office to be voted on by the electors of more than one county or selecting Democratic nominees for interim legislative appointments to represent multi-county districts by any method that contravenes the one-person, one-vote rule.

"*Cunningham v. Washington State Democratic Comm.*, Civ. No. C75-901 (WD Wash., permanent injunction entered Nov. 28, 1977). As a result of this injunction, RCW 29.42.020—which results in gross deviations from one-person, one-vote—has been superseded insofar as applied to the state committee when it performs electoral functions." Brief for Appellants 5 n. 11.

party affairs: The appellants' description of its activities makes this clear:

> "Between state conventions, the Democratic State Committee is the statewide party governing body. It meets at least four times each year, exercises the party's policy-making functions, directs the party's administrative apparatus, raises and distributes funds to Democratic candidates, conducts workshops to instruct candidates on effective campaign procedures and organization, and seeks generally to further the party's objectives of influencing policy and electing its adherents to public office. Insofar as is relevant here, the state committee is purely an internal party governing body." *Id.*, at 4–5 (footnotes omitted).

None of these activities, however, is required by statute to be performed by the Committee.[13] With respect to each, the source of the Committee's authority is the Charter adopted by the Democratic Party.[14]

In short, all of the "internal party decisions" which appellants claim should not be made by a statutorily composed Committee are made not because of anything in the statute,

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[13] In addition to its enumerated functions, the Committee is authorized by Wash. Rev. Code § 29.42.020 (1976) to "[p]erform all functions inherent in such an organization." See n. 1, *supra*. The Committee's role in internal party affairs, however, is clearly not "inherent" in its performance of the limited electoral functions authorized by statute.

[14] Indeed, it is the Charter provisions, rather than the state statute, which appellants themselves cite as authority for their description of the Committee activities at issue here. See Brief for Appellants 4 nn. 5–10. Thus, it is Art. IV (G)(1) of the Charter which provides that the Committee is the statewide governing body, shall raise funds for candidates, and shall exercise the party's policymaking functions. And it is subsection (2) of that same Article which authorizes the Committee to direct the party's administrative apparatus, while subsection (5) requires it to meet at least four times per year. Finally, the source of the Committee's authority to conduct workshops for candidates is found in Art. VII (C)(1) of the Charter.

but because of delegations of authority from the Convention itself. Nothing in the statute required the party to authorize such decisionmaking by the Committee; as far as the statutory scheme is concerned, there is no reason why the Convention could not have created an entirely new committee or one, for example, composed of members of the State Committee and such additional membership as might be desired to perform the political functions now performed by the State Committee. The fact that it did not choose such an alternative course is hardly the responsibility of the state legislature.

The answer to appellants' claims of a substantial burden on First Amendment rights, then, turns out to be a simple one. There can be no complaint that the party's right to govern itself has been substantially burdened by statute when the source of the complaint is the party's own decision to confer critical authority on the State Committee. The elected legislative representatives who claim that they have been unable to participate in the internal policymaking of the Committee should address their complaint to the party which has chosen to entrust those tasks to the Committee, rather than to the state legislature. Instead of persuading us that this is a case in which a state statute has imposed substantial burdens on the party's right to govern its affairs, appellants' own statement of the facts establishes that it is the party's exercise of that very right that is the source of whatever burdens they suffer.[15]

The judgment of the Washington Supreme Court is affirmed.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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[15] *Cousins* v. *Wigoda*, 419 U. S. 477, upon which appellants place their primary reliance, does not support their claim here. In *Cousins*, unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases, and renders *Cousins* inapposite.

DUNAWAY *v.* NEW YORK

CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT

No. 78-5066. Argued March 21, 1979—Decided June 5, 1979

A Rochester, N. Y., police detective questioned a jail inmate, the supposed source of a lead implicating petitioner in an attempted robbery and homicide, but learned nothing that supplied "enough information to get a warrant" for petitioner's arrest. Nevertheless, the detective ordered other detectives to "pick up" petitioner and "bring him in." Petitioner was then taken into custody, and although not told that he was under arrest, he would have been physically restrained if he had attempted to leave. He was driven to police headquarters and placed in an interrogation room, where he was questioned by officers after being given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436. He waived counsel and eventually made statements and drew sketches that incriminated him in the crime. At his state-court trial, his motions to suppress the statements and sketches were denied, and he was convicted. The New York appellate courts affirmed the conviction, but this Court vacated the judgment, and remanded for further consideration in light of the supervening decision in *Brown* v. *Illinois*, 422 U. S. 590, which held that there is no *per se* rule that *Miranda* warnings in and of themselves suffice to cure a Fourth Amendment violation involved in obtaining inculpatory statements during custodial interrogation following a formal arrest on less than probable cause, and that in order to use such statements, the prosecution must show not only that the statements meet the Fifth Amendment voluntariness standard, but also that the causal connection between the statements and the illegal arrest is broken sufficiently to purge the primary taint of the illegal arrest in light of the distinct policies and interests of the Fourth Amendment. On remand from the New York Court of Appeals, the trial court granted petitioner's motion to suppress, but the Appellate Division of the New York Supreme Court reversed, holding that although the police lacked probable cause to arrest petitioner, law enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights, and that even if petitioner's detention were illegal, the taint of such detention was sufficiently attenuated to allow the admission of his statements and sketches.

Held:

1. The Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they seized petitioner and transported him to the police station for interrogation. Pp. 206–216.

(a) Petitioner was "seized" in the Fourth Amendment sense when he was taken involuntarily to the police station, and the State concedes that the police lacked probable cause to arrest him before his incriminating statement during interrogation. P. 207.

(b) *Terry* v. *Ohio*, 392 U. S. 1, which held that limited "stop and frisk" searches for weapons are so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment "seizures" reasonable can be replaced by a test balancing the limited violation of individual privacy against the opposing interests in crime prevention and detection and in the police officer's safety, and the *Terry* case's progeny, do not support the application of a balancing test so as to hold that "seizures" such as that in this case may be justified by mere "reasonable suspicion." The narrow intrusions in *Terry* and its progeny were judged by a balancing test rather than the general rule requiring probable cause only because those intrusions fell so far short of the kind of intrusion associated with an arrest. For all but those narrowly defined intrusions, the requisite balancing has been performed in centuries of precedent and is embodied in the principle that seizures are reasonable only if supported by probable cause. Pp. 208–214.

(c) The treatment of petitioner, whether or not technically characterized as an arrest, was in important respects indistinguishable from a traditional arrest and must be supported by probable cause. Detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. Cf. *Davis* v. *Mississippi*, 394 U. S. 721; *Brown* v. *Illinois*, *supra*. Pp. 214–216.

2. The connection between the unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was not sufficiently attenuated to permit the use at trial of the statements and sketches. Pp. 216–219.

(a) Even though proper *Miranda* warnings may have been given and petitioner's statements may have been "voluntary" for purposes of the Fifth Amendment, "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." *Brown* v. *Illinois*, *supra*, at 601. While a confession after proper *Miranda* warnings may be found "voluntary" for Fifth Amendment purposes, this type of "volun-

tariness" is merely a threshold requirement for Fourth Amendment analysis. Pp. 216–217.

(b) Under Fourth Amendment analysis, which focuses on "the causal connection between the illegality and the confession," *Brown* v. *Illinois, supra,* at 603, factors to be considered in determining whether the confession is obtained by exploitation of an illegal arrest include: the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. Here, petitioner was admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance. Cf. *Brown* v. *Illinois, supra.* Pp. 217–219.

61 App. Div. 2d 299, 402 N. Y. S. 2d 490, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., *post,* p. 219, and STEVENS, J., *post,* p. 220, filed concurring opinions. REHNQUIST, J., filed a dissenting opinion in which BURGER, C. J., joined, *post,* p. 221. POWELL, J., took no part in the consideration or decision of the case.

Edward J. Nowak argued the cause for petitioner. With him on the brief was *James M. Byrnes.*

Melvin Bressler argued the cause for respondent. With him on the brief was *Lawrence T. Kurlander.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We decide in this case the question reserved 10 years ago in *Morales* v. *New York,* 396 U. S. 102 (1969), namely, "the question of the legality of custodial questioning on less than probable cause for a full-fledged arrest." *Id.,* at 106.

I

On March 26, 1971, the proprietor of a pizza parlor in Rochester, N. Y., was killed during an attempted robbery. On August 10, 1971, Detective Anthony Fantigrossi of the

**Richard Emery* and *Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Rochester Police was told by another officer that an informant had supplied a possible lead implicating petitioner in the crime. Fantigrossi questioned the supposed source of the lead—a jail inmate awaiting trial for burglary—but learned nothing that supplied "enough information to get a warrant" for petitioner's arrest. App. 60.[1] Nevertheless, Fantigrossi ordered other detectives to "pick up" petitioner and "bring him in." *Id.*, at 54. Three detectives located petitioner at a neighbor's house on the morning of August 11. Petitioner was taken into custody; although he was not told he was under arrest, he would have been physically restrained if he had attempted to leave. Opinion in *People* v. *Dunaway* (Monroe County Ct., Mar. 11, 1977), App. 116, 117. He was driven to police headquarters in a police car and placed in an interrogation room, where he was questioned by officers after being given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Petitioner waived counsel and eventually made statements and drew sketches that incriminated him in the crime.[2]

At petitioner's jury trial for attempted robbery and felony murder, his motions to suppress the statements and sketches were denied, and he was convicted. On appeal, both the

[1] See opinion in *People* v. *Dunaway* (Monroe County Ct., Mar. 11, 1977), App. 116–117. An informant had reportedly told the other detective that one James Cole had said that he and someone named "Irving" had been involved in the crime. The informant did not know "Irving's" last name, but had identified a picture of petitioner Dunaway from a police file. After hearing this information, Fantigrossi interviewed Cole, who was in jail pending an indictment for burglary. Cole denied any involvement in the crime, but stated that he had been told about it two months earlier by another inmate, Hubert Adams. According to Cole, Adams had mentioned that his younger brother, Ba Ba Adams, had told him that he and a fellow named "Irving," also known as "Axelrod," had been involved in the crime.

[2] See 61 App. Div. 2d 299, 301, 402 N. Y. S. 2d 490, 491 (1978). The first statement was made within an hour after Dunaway reached the police station; the following day he made a second, more complete statement.

Appellate Division of the Fourth Department and the New York Court of Appeals initially affirmed the conviction without opinion. 42 App. Div. 2d 689, 346 N. Y. S. 2d 779 (1973), aff'd, 35 N. Y. 2d 741, 320 N. E. 2d 646 (1974). However, this Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of the Court's supervening decision in *Brown* v. *Illinois*, 422 U. S. 590 (1975). 422 U. S. 1053 (1975). The petitioner in *Brown*, like petitioner Dunaway, made inculpatory statements after receiving *Miranda* warnings during custodial interrogation following his seizure—in that case a formal arrest—on less than probable cause. Brown's motion to suppress the statements was also denied and the statements were used to convict him. Although the Illinois Supreme Court recognized that Brown's arrest was unlawful, it affirmed the admission of the statements on the ground that the giving of *Miranda* warnings served to break the causal connection between the illegal arrest and the giving of the statements. This Court reversed, holding that the Illinois courts erred in adopting a *per se* rule that *Miranda* warnings in and of themselves sufficed to cure the Fourth Amendment violation; rather the Court held that in order to use such statements, the prosecution must show not only that the statements meet the Fifth Amendment voluntariness standard, but also that the causal connection between the statements and the illegal arrest is broken sufficiently to purge the primary taint of the illegal arrest in light of the distinct policies and interests of the Fourth Amendment.

In compliance with the remand, the New York Court of Appeals directed the Monroe County Court to make further factual findings as to whether there was a detention of petitioner, whether the police had probable cause, "and, in the event there was a detention and probable cause is not found for such detention, to determine the further question as to whether the making of the confessions was rendered infirm

by the illegal arrest (see *Brown* v. *Illinois*, 422 U. S. 590, *supra*)." *People* v. *Dunaway*, 38 N. Y. 2d 812, 813–814, 345 N. E. 2d 583, 584 (1975).

The County Court determined after a supplementary suppression hearing that Dunaway's motion to suppress should have been granted. Although reaffirming that there had been "full compliance with the mandate of *Miranda* v. *Arizona*," the County Court found that "this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police . . . ." App. 117. The State's attempt to justify petitioner's involuntary investigatory detention on the authority of *People* v. *Morales*, 22 N. Y. 2d 55, 238 N. E. 2d 307 (1968)—which upheld a similar detention on the basis of information amounting to less than probable cause for arrest—was rejected on the grounds that the precedential value of *Morales* was questionable,[3] and that the controlling authority was the "strong language" in *Brown* v. *Illinois* indicating "disdain for custodial questioning without probable cause to arrest."[4] The County Court further held that "the factual predicate in this case did not amount to probable cause sufficient to support the arrest of the defendant," that "the *Miranda* warnings by themselves did not purge the taint of the defend-

[3] We granted certiorari in *Morales* and noted that "[t]he ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest, is manifestly important, goes beyond our subsequent decisions in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and *Sibron* v. *New York*, 392 U. S. 40 (1968), and is claimed by petitioner to be at odds with *Davis* v. *Mississippi*, 394 U. S. 721 (1969)." *Morales* v. *New York*, 396 U. S. 102, 104–105 (1969). Nevertheless, inadequacies in the record led us to remand for further development and to reserve the issue we decide today for a record that "squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises." *Id.*, at 105. On remand, the New York courts determined that Morales had gone to the police voluntarily. *People* v. *Morales*, 42 N. Y. 2d 129, 137–138, 366 N. E. 2d 248, 252–253 (1977).

[4] App. 118; see *Brown* v. *Illinois*, 422 U. S., at 602, 605.

ant's illegal seizure[,] *Brown* v. *Illinois, supra,* and [that] there was no claim or showing by the People of any attenuation of the defendant's illegal detention," App. 121. Accordingly petitioner's motion to suppress was granted. *Ibid.*

A divided Appellate Division reversed. Although agreeing that the police lacked probable cause to arrest petitioner, the majority relied on the Court of Appeals' reaffirmation, subsequent to the County Court's decision, that "[l]aw enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights." 61 App. Div. 2d 299, 302, 402 N. Y. S. 2d 490, 492 (1978), quoting *People* v. *Morales,* 42 N. Y. 2d 129, 135, 366 N. E. 2d 248, 251 (1977). The Appellate Division also held that even if petitioner's detention were illegal, the taint of his illegal detention was sufficiently attenuated to allow the admission of his statements and sketches. The Appellate Division emphasized that petitioner was never threatened or abused by the police and purported to distinguish *Brown* v. *Illinois.*[5] The Court of Appeals dismissed petitioner's application for leave to appeal. App. 134.

We granted certiorari, 439 U. S. 979 (1978), to clarify the Fourth Amendment's requirements as to the permissible grounds for custodial interrogation and to review the New York court's application of *Brown* v. *Illinois.* We reverse.

II

We first consider whether the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took petitioner into custody, transported

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[5] 61 App. Div. 2d, at 303–304, 402 N. Y. S. 2d, at 493. Two of the five members of the court dissented on this issue. *Id.,* at 304, 402 N. Y. S. 2d, at 493 (Denman, J., concurring); *id.,* at 305, 402 N. Y. S. 2d, at 494 (Cardamone, J., dissenting).

him to the police station, and detained him there for interrogation.

The Fourth Amendment, applicable to the States through the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961), provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause . . . ." There can be little doubt that petitioner was "seized" in the Fourth Amendment sense when he was taken involuntarily to the police station.[6] And respondent State concedes that the police lacked probable cause to arrest petitioner before his incriminating statement during interrogation.[7] Nevertheless respondent contends that the seizure of petitioner did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a "reasonable suspicion" that petitioner possessed "intimate knowledge about a serious and unsolved crime." Brief for Respondent 10. We disagree.

Before *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Fourth

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[6] "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968). Respondent contends that petitioner accompanied the police voluntarily and therefore was not "seized." Brief for Respondent 7–9. The County Court found otherwise, App. 117, quoted *supra*, at 205; and the Appellate Division treated the case as an involuntary detention justified by reasonable suspicion. See 61 App. Div. 2d, at 302–303, 402 N. Y. S. 2d, at 492. See also ALI, Model Code of Pre-Arraignment Procedure § 2.01 (3) and commentary, p. 91 (Tent. Draft No. 1, 1966) (request to come to police station "may easily carry an implication of obligation, while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen").

[7] Both the County Court and the Appellate Division found that the police lacked probable cause, and respondent does not question those findings here. See 61 App. Div. 2d, at 302, 402 N. Y. S. 2d, at 492; App. 120, citing *Spinelli* v. *United States*, 393 U. S. 410 (1969); *Aguilar* v. *Texas*, 378 U. S. 108 (1964).

Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The basic principles were relatively simple and straightforward: The term "arrest" was synonymous with those seizures governed by the Fourth Amendment. While warrants were not required in all circumstances,[8] the requirement of probable cause, as elaborated in numerous precedents,[9] was treated as absolute.[10] The "long-prevailing standards" of probable cause embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949). The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applied to all arrests, without the need to "balance" the interests and circumstances involved in particular situations. Cf. *Camara* v. *Municipal Court*, 387 U. S. 523 (1967).

Terry for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must

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[8] See, *e. g.*, *Warden* v. *Hayden*, 387 U. S. 294 (1967) (hot pursuit); *United States* v. *Watson*, 423 U. S. 411 (1976) (felony arrests in public places).

[9] "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed [by the person to be arrested]." *Brinegar* v. *United States*, 338 U. S. 160, 175–176 (1949), quoting *Carroll* v. *United States*, 267 U. S. 132, 162 (1925). See generally 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 436–480 (1978).

[10] See *Gerstein* v. *Pugh*, 420 U. S. 103, 111–112 (1975); *Ker* v. *California*, 374 U. S. 23 (1963).

be based on probable cause. That case involved a brief, on-the-spot stop on the street and a frisk for weapons, a situation that did not fit comfortably within the traditional concept of an "arrest." Nevertheless, the Court held that even this type of "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" constituted a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," 392 U. S., at 20, 17, and therefore "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.*, at 20. However, since the intrusion involved in a "stop and frisk" was so much less severe than that involved in traditional "arrests," the Court declined to stretch the concept of "arrest"—and the general rule requiring probable cause to make arrests "reasonable" under the Fourth Amendment—to cover such intrusions. Instead, the Court treated the stop-and-frisk intrusion as a *sui generis* "rubric of police conduct," *ibid.* And to determine the justification necessary to make this specially limited intrusion "reasonable" under the Fourth Amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety. *Id.*, at 22–27. As a consequence, the Court established "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.*, at 27.[11] Thus, *Terry* departed from traditional Fourth Amendment analysis in two respects.

[11] The Court stressed the limits of its holding: the police officer's belief that his safety or that of others is in danger must be objectively reasonable—based on reasonable inferences from known facts—so that it can be tested at the appropriate time by "the more detached, neutral scrutiny of a judge," 392 U. S., at 21, 27; and the extent of the intrusion must be carefully tailored to the rationale justifying it.

First, it defined a special category of Fourth Amendment "seizures" so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment "seizures" reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.

Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope. *Terry* itself involved a limited, on-the-street frisk for weapons.[12] Two subsequent cases which applied *Terry* also involved limited weapons frisks. See *Adams* v. *Williams*, 407 U. S. 143 (1972) (frisk for weapons on basis of reasonable suspicion); *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) (order to get out of car is permissible "*de minimis*" intrusion after car is lawfully detained for traffic violations; frisk for weapons justified after "bulge" observed in jacket). *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), applied *Terry* in the special context of roving border patrols stopping automobiles to check for illegal immigrants. The investigative stops usually consumed

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[12] *Terry* specifically declined to address "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." *Id.*, at 19 n. 16. MR. JUSTICE WHITE, in a concurring opinion, made these observations on the matter of interrogation during an investigative stop:

"There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.*, at 34.

less than a minute and involved "a brief question or two." 422 U. S., at 880. The Court stated that "[b]ecause of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest." *Ibid.*[13] See also *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976) (fixed checkpoint to stop and check vehicles for aliens); *Delaware* v. *Prouse*, 440 U. S. 648 (1979) (random checks for drivers' licenses and proper vehicle registration not permitted on less than articulable reasonable suspicion).

Respondent State now urges the Court to apply a balancing test, rather than the general rule, to custodial interrogations, and to hold that "seizures" such as that in this case may be justified by mere "reasonable suspicion."[14] *Terry* and its

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[13] "[B]ecause of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." 422 U. S., at 881.

[14] The factors that respondent would consider relevant in its balancing test, and the scope of the rule the test would produce, are not completely clear. The Appellate Division quoted two apparently different tests from the Court of Appeals opinion in *People* v. *Morales*, 42 N. Y. 2d 129, 366 N. E. 2d 248 (1977):

"'[L]aw enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights' (42 NY2d, at p. 135). '"[A] policeman's right to request information while discharging his law enforcement duties will hinge on the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter"' (42 NY2d, at p. 137, quoting from *People* v. *De Bour*, 40 NY2d 210, 219)." 61 App. Div. 2d, at 302, 402 N. Y. S. 2d, at 492.

Then, in characterizing the case before it, the Appellate Division suggested yet a third "test":

"[T]his case involves a brief detention for interrogation based upon reasonable suspicion, where there was no formal accusation filed against defend-

progeny clearly do not support such a result. The narrow intrusions involved in those cases were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the "long-prevailing standards" of probable cause, *Brinegar* v. *United States*, 338 U. S., at 176, only because these intrusions fell far short of the kind of intrusion associated with an arrest. Indeed, *Brignoni-Ponce* expressly refused to extend *Terry* in the manner respondent now urges. The Court there stated: "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause.*" 422 U. S., at 881–882 (emphasis added). Accord, *United States* v. *Martinez-Fuerte*, *supra*, at 567.

In contrast to the brief and narrowly circumscribed intrusions involved in those cases, the detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, see *Cupp* v. *Murphy*, 412 U. S. 291 (1973), obviously do not make petitioner's

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ant and where great public interest existed in solving a brutal crime which had remained unsolved for a period of almost five months." *Id.*, at 303, 402 N. Y. S. 2d, at 492.

seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause.

The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. "The requirement of probable cause has roots that are deep in our history." *Henry* v. *United States,* 361 U. S. 98, 100 (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." *Id.,* at 101 (footnotes omitted). The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. See *Brinegar* v. *United States, supra,* at 175–176.

In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests.[15] But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). A single, familiar standard is essential to

[15] See n. 14, *supra.*

guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.[16] Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Moreover, two important decisions since *Terry* confirm the conclusion that the treatment of petitioner, whether or not it is technically characterized as an arrest, must be supported by probable cause. *Davis* v. *Mississippi*, 394 U. S. 721 (1969), decided the Term after *Terry*, considered whether fingerprints taken from a suspect detained without probable cause must be excluded from evidence. The State argued that the detention "was of a type which does not require probable cause," 394 U. S., at 726, because it occurred during an investigative, rather than accusatory, stage, and because it was for the sole purpose of taking fingerprints. Rejecting the State's first argument, the Court warned:

> "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our

[16] While the rule proposed by respondent is not entirely clear, the Appellate Division cited with approval a test that would require an officer to weigh before any custodial interrogation "the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter." See n. 14, *supra*.

> citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Id.*, at 726–727.

The State's second argument in *Davis* was more substantial, largely because of the *distinctions* between taking fingerprints and interrogation:

> "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree.' Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time." *Id.*, at 727.

In *Davis*, however, the Court found it unnecessary to decide the validity of a "narrowly circumscribed procedure for obtaining" the fingerprints of suspects without probable cause—in part because, as the Court emphasized, "petitioner was not merely fingerprinted during the . . . detention but *also subjected to interrogation.*" *Id.*, at 728 (emphasis added). The detention therefore violated the Fourth Amendment.

Brown v. *Illinois*, 422 U. S. 590 (1975), similarly disapproved arrests made for "investigatory" purposes on less than probable cause. Although Brown's arrest had more of the trappings of a technical formal arrest than petitioner's, such differences in form must not be exalted over substance.[17]

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[17] The officers drew their guns, informed Brown that he was under arrest, and handcuffed him. But Brown, unlike petitioner, was not a teenager; and the police had a report that he possessed a pistol and had used it on occasion, 422 U. S., at 594. The police in this case would have resorted to similar measures if petitioner had resisted being taken into custody. App. 117.

Once in the police station, Brown was taken to an interrogation room, and his experience was indistinguishable from petitioner's. Our condemnation of the police conduct in *Brown* fits equally the police conduct in this case:

> "The impropriety of the arrest was obvious; awareness of the fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.' . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up." *Id.*, at 605.

See also *id.*, at 602.

These passages from *Davis* and *Brown* reflect the conclusion that detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation.

III

There remains the question whether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches. See *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Nardone* v. *United States*, 308 U. S. 338 (1939); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

The New York courts have consistently held, and petitioner does not contest, that proper *Miranda* warnings were given and that his statements were "voluntary" for purposes of the Fifth Amendment. But *Brown* v. *Illinois*, *supra*, settled that

"[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth," 422 U. S., at 601, and held therefore that "*Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation." *Ibid.*

> "If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings." *Id.*, at 602.

Consequently, although a confession after proper *Miranda* warnings may be found "voluntary" for purposes of the Fifth Amendment,[18] this type of "voluntariness" is merely a "threshold requirement" for Fourth Amendment analysis, 422 U. S., at 604. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached.

Beyond this threshold requirement, *Brown* articulated a test designed to vindicate the "distinct policies and interests of the Fourth Amendment." *Id.*, at 602. Following *Wong Sun*, the Court eschewed any *per se* or "but for" rule, and identified the relevant inquiry as "whether Brown's statements were obtained by exploitation of the illegality of his arrest," 422 U. S., at 600; see *Wong Sun* v. *United States*, *supra*, at 488. *Brown*'s focus on "the causal connection between the illegality and the confession," 422 U. S., at 603, reflected the two policies behind the use of the exclusionary rule to effec-

[18] But see *Westover* v. *United States*, 384 U. S. 436, 494–497 (1966) (decided with *Miranda* v. *Arizona*).

tuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

Brown identified several factors to be considered "in determining whether the confession is obtained by exploitation of an illegal arrest[: t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . . . And the burden of showing admissibility rests, of course, on the prosecution." *Id.*, at 603–604.[19] Examining the case before it, the Court readily concluded that the State had failed to sustain its burden of showing the confession was admissible. In the "less than two hours" that elapsed between the arrest and the confession "there was no intervening event of significance whatsoever." *Ibid.* Furthermore, the arrest without probable cause had a "quality of purposefulness" in that it was an "expedition for evidence" admittedly undertaken "in the hope that something might turn up." *Id.*, at 605.

The situation in this case is virtually a replica of the situation in *Brown*. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance.[20] Nevertheless, three members of the Appellate Division purported to distinguish *Brown* on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police

[19] See generally, 3 LaFave, *supra* n. 9, at 630–638; Comment, 25 Emory L. J. 227, 239–244 (1976); Comment, 13 Houston L. Rev. 753, 763–770 (1976).

[20] The cases are even parallel in that both Brown and petitioner made subsequent statements, see n. 2, *supra; Brown* v. *Illinois*, 422 U. S., at 595–596, which in each case were "clearly the result and the fruit of the first." *Id.*, at 605, and n. 12.

conduct was "highly protective of defendant's Fifth and Sixth Amendment rights." 61 App. Div. 2d, at 303, 402 N. Y. S. 2d, at 493. This betrays a lingering confusion between "voluntariness" for purposes of the Fifth Amendment and the "causal connection" test established in *Brown*. Satisfying the Fifth Amendment is only the "threshold" condition of the Fourth Amendment analysis required by *Brown*. No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth." [21]

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring.

The opinion of the Court might be read to indicate that *Terry* v. *Ohio*, 392 U. S. 1 (1968), is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases hold, however, the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests. *E. g., Delaware* v. *Prouse*, 440 U. S. 648, 653–654 (1979); *Michigan* v. *Tyler*, 436 U. S. 499, 506 (1978); *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 321–322 (1978); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); *Terry* v. *Ohio*, *supra*, at 20–21; *Camara* v. *Municipal Court*, 387 U. S. 523, 536–537 (1967). But if courts and law enforcement officials are to have workable rules, see *Rakas* v. *Illinois*, 439 U. S. 128, 168 (1978) (dissenting opinion), this balancing must in large part be done on a categorical basis—not in an ad hoc, case-by-

[21] Comment, 25 Emory L. J. 227, 238 (1976).

case fashion by individual police officers. Cf. *Mincey* v. *Arizona*, 437 U. S. 385, 394–395 (1978). On the other hand, the need for rules of general applicability precludes neither the recognition in particular cases of extraordinary private or public interests, cf. *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 564–565 (1978), nor the generic recognition of certain exceptions to the normal rule of probable cause where more flexibility is essential. Cf., *e. g.*, *Terry* v. *Ohio*, *supra*. It is enough, for me, that the police conduct here is similar enough to an arrest that the normal level of probable cause is necessary before the interests of privacy and personal security must give way.

MR. JUSTICE STEVENS, concurring.

Although I join the Court's opinion, I add this comment on the significance of two factors that may be considered when determining whether a confession has been obtained by exploitation of an illegal arrest.

The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one. Conversely, even an immediate confession may have been motivated by a prearrest event such as a visit with a minister.

The flagrancy of the official misconduct is relevant, in my judgment, only insofar as it has a tendency to motivate the defendant. A midnight arrest with drawn guns will be equally frightening whether the police acted recklessly or in good faith. Conversely, a courteous command has the same effect on the arrestee whether the officer thinks he has probable cause or knows that he does not. In either event, if the Fourth Amendment is violated, the admissibility question will turn on the causal relationship between that violation and the defendant's subsequent confession.

I recognize that the deterrence rationale for the exclusion-

ary rule is sometimes interpreted quite differently.[1] Under that interpretation, exclusion is applied as a substitute for punishment of the offending officer; if he acted recklessly or flagrantly, punishment is appropriate, but if he acted in good faith, it is not.[2] But when evidence is excluded at a criminal trial, it is the broad societal interest in effective law enforcement that suffers. The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

If the Court did no more in this case than it announced in the opening sentence of its opinion—"decide . . . the question reserved 10 years ago in *Morales* v. *New York*, 396 U. S. 102 (1969), namely, 'the question of the legality of custodial questioning on less than probable cause for a full-fledged arrest' "– I would have little difficulty joining its opinion. The decision of this question, however, does not, contrary to the implication in the Court's opening sentence, decide this case. For the Court goes on to conclude that petitioner Dunaway was in fact "seized" within the meaning of the Fourth Amendment, and that the connection between Dunaway's purported detention and the evidence obtained therefrom was not sufficiently attenuated as to dissipate the taint of the alleged unlawful police conduct. *Ante*, at 207, 216–219. I cannot agree with either conclusion, and accordingly, I dissent.

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[1] See, *e. g.*, MR. JUSTICE REHNQUIST, dissenting, *post*, at 226.

[2] I would agree that the officer's subjective state of mind is relevant when he is being sued for damages, but this case involves the question whether the evidence he has obtained is admissible at trial.

I

There is obviously nothing in the Fourth Amendment that prohibits police from calling from their vehicle to a particular individual on the street and asking him to come over and talk with them; nor is there anything in the Fourth Amendment that prevents the police from knocking on the door of a person's house and when the person answers the door, inquiring whether he is willing to answer questions that they wish to put to him. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry* v. *Ohio*, 392 U. S. 1, 19 n. 16 (1968). Voluntary questioning not involving any "seizure" for Fourth Amendment purposes may take place under any number of varying circumstances. And the occasions will not be few when a particular individual agrees voluntarily to answer questions that the police wish to put to him either on the street, at the station, or in his house, and later regrets his willingness to answer those questions. However, such morning-after regrets do not render involuntary responses that were voluntary at the time they were made. In my view, this is a case where the defendant voluntarily accompanied the police to the station to answer their questions.

In *Terry* v. *Ohio*, the Court set out the test for determining whether a person has been "seized" for Fourth Amendment purposes. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Ibid.* In this case three police officers were dispatched to petitioner's house to question him about his participation in a robbery According to the testimony of the police officers, one officer approached a house where petitioner was thought to be located and knocked on the door. When a person answered the door, the officer identified himself and asked the individual his name. App. 97–98. After learning that the person who answered the door was

petitioner, the officer asked him if he would accompany the officers to police headquarters for questioning, and petitioner responded that he would. *Id.*, at 89–90; see 61 App. Div. 2d 299, 301, 402 N. Y. S. 2d 490, 491 (1978). Petitioner was not told that he was under arrest or in custody and was not warned not to resist or flee. No weapons were displayed and petitioner was not handcuffed. Each officer testified that petitioner was not touched or held during the trip downtown; his freedom of action was not in any way restrained by the police. App. 78–79, 99. In short, the police behavior in this case was entirely free of "physical force or show of authority."

The Court, however, categorically states in text that "[t]here can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station." *Ante*, at 207. In an accompanying footnote, the Court states: "Respondent contends that petitioner accompanied the police voluntarily and therefore was not 'seized.' . . . The County Court found otherwise . . . and the Appellate Division treated the case as an involuntary detention justified by reasonable suspicion." *Ante*, at 207 n. 6. The Court goes on to cite a commentary from the Tentative Draft of the ALI Model Code of Pre-Arraignment Procedure to the effect that a "request to come to [the] police station 'may easily carry an implication of obligation, while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen.'" *Ibid.*

The Court's heavy reliance on the conclusions of the Monroe County Court on this issue is misplaced, however. That court clearly did not apply the *Terry* standard in determining whether there had been a seizure. Instead, that court's conclusions were based solely on the facts that petitioner was in the physical custody of detectives until he reached police headquarters and that "had he attempted to leave the company of the said detectives, they would have physically restrained him (per stipulation of People at conclusion of hearing)." App. 117. But the fact that the officers accompanied

petitioner from his house to the station in no way vitiates the State's claim that petitioner acted voluntarily. Similarly, the unexpressed intentions of police officers as to hypothetical situations have little bearing on the question whether the police conduct, objectively viewed, restrained petitioner's liberty by show of force or authority.

The Appellate Division's opinion also can be of no assistance to the Court. The Court's opinion characterizes the Appellate Division's treatment of the case "as an involuntary detention justified by reasonable suspicion." *Ante*, at 207 n. 6. But the Appellate Division did not accept the County Court's conclusion that petitioner did not voluntarily accompany the police to the station. To the contrary, in its recitation of the facts, the Appellate Division recites the officers' testimony that petitioner voluntarily agreed to come downtown to talk with them. 61 App. Div. 2d, at 301, 302, 402 N. Y. S. 2d, at 491, 492. That the Appellate Division found that it was able to resolve the case on the basis of the Court of Appeals' decision in *People* v. *Morales*, 42 N. Y. 2d 129, 366 N. E. 2d 248 (1977), does not mean that the Appellate Division decided that petitioner had been "seized" within the meaning of the Fourth Amendment.

Finally, the Court quotes the Model Code for Pre-Arraignment Procedure to support its assertion. *Ante*, at 207 n. 6. I do not dispute the fact that a police request to come to the station may indeed be an "awesome experience." But I do not think that that fact alone means that in every instance where a person assents to a police request to come to headquarters, there has been a "seizure" within the meaning of the Fourth Amendment. The question turns on whether the officer's conduct is objectively coercive or physically threatening, not on the mere fact that a person might in some measure feel cowed by the fact that a request is made by a police officer. Cf. *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977).[1]

[1] Neither *Davis* v. *Mississippi*, 394 U. S. 721 (1969), nor *Brown* v. *Illinois*, 422 U. S. 590 (1975), which the Court treats as points of depar-

Therefore, although I agree that the police officers in this case did not have that degree of suspicion or probable cause that would have justified them in physically compelling petitioner to accompany them to the police station for questioning, I do not believe that the record demonstrates as a fact that this is what happened. No involuntary detention for questioning was shown to have taken place. The Fourth Amendment, accordingly, does not require suppression of petitioner's statements.

II

Assuming, *arguendo*, that there was a "seizure" in this case, I still cannot agree with the Court that the Fourth Amendment requires suppression of petitioner's statements and sketches. Relying on *Brown* v. *Illinois*, 422 U. S. 590 (1975), the Court concludes that this evidence must be suppressed primarily, it seems, because no intervening events broke the connection between petitioner's detention and his confession. *Ante*, at 219. In my view, the connection between petitioner's allegedly unlawful detention and the incriminating statements and sketches is sufficiently attenuated to permit their use at trial. See *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

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ture for today's opinion, supports the Court's conclusion that petitioner was "seized" within the meaning of the Fourth Amendment. In *Davis*, the State made no claim that Davis had voluntarily accompanied the police officers to headquarters. 394 U. S., at 726. Similarly, in *Brown* there could be no reasonable disagreement that the defendant had been "seized" for Fourth Amendment purposes. In *Brown*, two detectives of the Chicago police force broke into Brown's apartment and searched it. When Brown entered the apartment, he was told that he was under arrest, was held at gunpoint, and was searched. He then was handcuffed and escorted to the squad car that eventually took him to the police station. 422 U. S., at 593. No doubt this police activity was the cause of the Court's observation that "[t]he illegality here, moreover, had a quality of purposefulness. . . . The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.*, at 605. No such circumstances occurred here.

In *Brown* v. *Illinois, supra,* we identified several factors to be considered in determining whether inculpatory statements were sufficiently a product of free will to be admissible under the Fourth Amendment. The voluntariness of the statements is a threshold requirement. That *Miranda* warnings are given is "an important factor." 422 U. S., at 603–604. Also relevant are "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct." *Ibid.* But the Court did not assign equal weight to each of these factors. Given the deterrent purposes of the exclusionary rule, the "purpose and flagrancy" of the police conduct is, in my view, the most important factor. Where police have acted in good faith and not in a flagrant manner, I would require no more than that proper *Miranda* warnings be given and that the statement be voluntary within the meaning of the Fifth Amendment. *Brown* v. *Illinois, supra,* at 612 (POWELL, J., concurring in part). "Absent aggravating circumstances, I would consider a statement given at the station house after one has been advised of *Miranda* rights to be sufficiently removed from the immediate circumstances of the illegal arrest to justify its admission at trial." *Ibid.*

The Court concedes that petitioner received proper *Miranda* warnings and that his statements were "voluntary" for purposes of the Fifth Amendment. *Ante,* at 216. And the police acted in good faith. App. 61; see *United States* v. *Peltier,* 422 U. S. 531, 536–537 (1975). At the time of petitioner's detention, the New York Court of Appeals had held that custodial questioning on less than probable cause for an arrest was permissible under the Fourth Amendment. *People* v. *Morales,* 22 N. Y. 2d 55, 238 N. E. 2d 307 (1968).[2] Petitioner

[2] This Court granted certiorari in *Morales,* but, as the Court points out, *ante,* at 205 n. 3, we ultimately reserved decision on the question of the legality of involuntary investigatory detention on less than probable cause. *Morales* v. *New York,* 396 U. S. 102 (1969).

testified that the police never threatened or abused him. App. 35. Petitioner voluntarily gave his first statement to police about an hour after he reached the police station and then gave another statement to police the following day. Contrary to the Court's suggestion, the police conduct in this case was in no manner as flagrant as that of the police in *Brown* v. *Illinois, supra.* See 422 U. S., at 605; n. 1, *supra.* Thus, in my view, the record convincingly demonstrates that the statements and sketches given police by petitioner were of sufficient free will as to purge the primary taint of his alleged illegal detention. I would, therefore, affirm the judgment of the Appellate Division of the Supreme Court of New York.

DAVIS *v.* PASSMAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–5072. Argued February 27, 1979—Decided June 5, 1979

Petitioner brought suit in Federal District Court alleging that respondent, who was a United States Congressman at the time this case commenced, had discriminated against petitioner on the basis of her sex, in violation of the Fifth Amendment, by terminating her employment as a deputy administrative assistant. Petitioner sought damages in the form of backpay, and jurisdiction was founded on the provisions of 28 U. S. C. § 1331 (a) that confer original jurisdiction on federal district courts of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 and arises under the Federal Constitution. The District Court ruled that petitioner had no private right of action, and the Court of Appeals ultimately held that "no right of action may be implied from the Due Process Clause of the fifth amendment."

Held: A cause of action and damages remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. Cf. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388; *Butz* v. *Economou*, 438 U. S. 478. Pp. 233–249.

(a) The equal protection component of the Fifth Amendment's Due Process Clause confers on petitioner a federal constitutional right to be free from gender discrimination that does not serve important governmental objectives or is not substantially related to the achievement of such objectives. Pp. 234–235.

(b) The term "cause of action," as used in this case, refers to whether a plaintiff is a member of a class of litigants that may, as a matter of law, appropriately invoke the power of the court. Since petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment, claiming that her rights under that Amendment have been violated and that she has no effective means other than the judiciary to vindicate these rights, she is an appropriate party to invoke the District Court's general federal-question jurisdiction to seek relief, and she therefore has a cause of action under the Fifth Amendment. The Court of Appeals erred in using the criteria of *Cort* v. *Ash*, 422 U. S. 66, to conclude that petitioner lacked such a cause of action, since the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right protected by the Constitution. Pp. 236–244.

(c) Petitioner should be able to redress her injury in damages if she is able to prevail on the merits. A damages remedy is appropriate, since it is a "remedial mechanism normally available in the federal courts," *Bivens, supra,* at 397, since it would be judicially manageable without difficult questions of valuation or causation, and since there are no available alternative forms of relief. Moreover, if respondent's actions are not shielded by the Speech or Debate Clause, the principle that legislators ought generally to be bound by the law as are ordinary persons applies. And there is "no explicit congressional declaration that persons" in petitioner's position injured by unconstitutional federal employment discrimination "may not recover money damages from" those responsible for the injury. *Ibid.* To afford petitioner a damages remedy does not mean that the federal courts will be deluged with claims, as the Court of Appeals feared. Moreover, current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles. Pp. 245–249.

571 F. 2d 793, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post,* p. 249. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. 251. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 251.

Sana F. Shtasel argued the cause *pro hac vice* for petitioner. With her on the briefs were *Peter Barton Hutt* and *Jeffrey S. Berlin.*

A. Richard Gear argued the cause and filed a brief for respondent.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Bivens v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), held that a "cause of action for damages" arises under

*Briefs of *amici curiae* urging reversal were filed by *Burt Neuborne* and *Bruce J. Ennis* for the American Civil Liberties Union; and by *Albert J. Beveridge III, Harold Himmelman,* and *Roderic V. O. Boggs* for Morris Udall et al.

the Constitution when Fourth Amendment rights are violated. The issue presented for decision in this case is whether a cause of action and a damages remedy can also be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. The Court of Appeals for the Fifth Circuit, en banc, concluded that "no civil action for damages" can be thus implied. 571 F. 2d 793, 801 (1978). We granted certiorari, 439 U. S. 925 (1978), and we now reverse.

I

At the time this case commenced, respondent Otto E. Passman was a United States Congressman from the Fifth Congressional District of Louisiana.[1] On February 1, 1974, Passman hired petitioner Shirley Davis as a deputy administrative assistant.[2] Passman subsequently terminated her employment, effective July 31, 1974, writing Davis that, although she was "able, energetic and a very hard worker," he had concluded "that it was essential that the understudy to my Administrative Assistant be a man."[3] App. 6.

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[1] Passman was defeated in the 1976 primary election, and his tenure in office ended January 3, 1977.

[2] In her complaint, Davis avers that her "salary was $18,000.00 per year with the expectation of a promotion to defendant's administrative assistant at a salary of $32,000.00 per year upon the imminent retirement of defendant's current administrative assistant." App. 4.

Davis was not hired through the competitive service. See 2 U. S. C. § 92.

[3] The full text of Passman's letter is as follows:

Dear Mrs. Davis:

My Washington staff joins me in saying that we miss you very much. But, in all probability, inwardly they all agree that I was doing you an injustice by asking you to assume a responsibility that was so trying and so hard that it would have taken all of the pleasure out of your work. I must be completely fair with you, so please note the following:

You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity

Davis brought suit in the United States District Court for the Western District of Louisiana, alleging that Passman's conduct discriminated against her "on the basis of sex in violation of the United States Constitution and the Fifth Amendment thereto." *Id.*, at 4. Davis sought damages in the form of backpay. *Id.*, at 5.[4] Jurisdiction for her suit was founded on 28 U. S. C. § 1331 (a), which provides in pertinent part that federal "district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution . . . of the United States . . . ."

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of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

It would be unfair to you for me to ask you to waste your talent and experience in my Monroe office because of the low salary that is available because of a junior position. Therefore, and so that your experience and talent may be used to advantage in some organization in need of an extremely capable secretary, I desire that you be continued on the payroll at your present salary through July 31, 1974. This arrangement gives you your full year's vacation of one month, plus one additional month. May I further say that the work load in the Monroe office is very limited, and since you would come in as a junior member of the staff at such a low salary, it would actually be an offense to you.

I know that secretaries with your ability are very much in demand in Monroe. If an additional letter of recommendation from me would be advantageous to you, do not hesitate to let me know. Again, assuring you that my Washington staff and your humble Congressman feel that the contribution you made to our Washington office has helped all of us.

With best wishes,

Sincerely,
/s/ Otto E. Passman
OTTO E. PASSMAN
Member of Congress

App. 6–7.

[4] Davis also sought equitable relief in the form of reinstatement, as well as a promotion and salary increase. *Id.*, at 4–5. Since Passman is no longer a Congressman, however, see n. 1, *supra*, these forms of relief are no longer available.

Passman moved to dismiss Davis' action for failure to state a claim upon which relief can be granted, Fed. Rule Civ. Proc. 12 (b)(6), arguing, *inter alia*, that "the law affords no private right of action" for her claim.[5] App. 8. The District Court accepted this argument, ruling that Davis had "no private right of action." *Id.*, at 9.[6] A panel of the Court of Appeals for the Fifth Circuit reversed. 544 F. 2d 865 (1977). The panel concluded that a cause of action for damages arose directly under the Fifth Amendment; that, taking as true the allegations in Davis' complaint, Passman's conduct violated the Fifth Amendment; and that Passman's conduct was not shielded by the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1.[7]

The Court of Appeals for the Fifth Circuit, sitting en banc, reversed the decision of the panel. The en banc court did not reach the merits, nor did it discuss the application of the Speech or Debate Clause. The court instead held that "no right of action may be implied from the Due Process Clause of the fifth amendment." 571 F. 2d, at 801. The court reached this conclusion on the basis of the criteria that had been set out in *Cort* v. *Ash*, 422 U. S. 66 (1975), for determining whether a private cause of action should be implied from a federal statute.[8] Noting that Congress had failed to create a

[5] Passman also argued that his alleged conduct was "not violative of the Fifth Amendment to the Constitution," and that relief was barred "by reason of the sovereign immunity doctrine and the official immunity doctrine." App. 8.

[6] The District Court also ruled that, although "the doctrines of sovereign and official immunity" did not justify dismissal of Davis' complaint, "the discharge of plaintiff on alleged grounds of sex discrimination by defendant is not violative of the Fifth Amendment to the Constitution." *Id.*, at 9.

[7] The panel also held that, although sovereign immunity did not bar a damages award against Passman individually, he was entitled at trial to a defense of qualified immunity.

[8] The criteria set out in *Cort* v. *Ash* are:

"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39

damages remedy for those in Davis' position, the court also concluded that "the proposed damage remedy is not constitutionally compelled" so that it was not necessary to "countermand the clearly discernible will of Congress" and create such a remedy. 571 F. 2d, at 800.

II

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, federal agents had allegedly arrested and searched Bivens without

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(1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g.*, *Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394–395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment)." 422 U. S., at 78.

The Court of Appeals had some difficulty applying these criteria to determine whether a cause of action should be implied under the Constitution. It eventually concluded, however, (1) that although "the fifth amendment right to due process certainly confers a right upon Davis, the injury alleged here does not infringe this right as directly as" the violation of the Fourth Amendment rights alleged in *Bivens*, 571 F. 2d, at 797; (2) that "[c]ongressional remedial legislation for employment discrimination has carefully avoided creating a cause of action for money damages for one in Davis' position," *id.*, at 798; (3) that, unlike violations of the Fourth Amendment, "the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable," *id.*, at 799; and (4) that implying a cause of action under the Due Process Clause would create "the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceedings . . . ." *Id.*, at 800.

probable cause, thereby subjecting him to great humiliation, embarrassment, and mental suffering. *Bivens* held that the Fourth Amendment guarantee against "unreasonable searches and seizures" was a constitutional right which Bivens could enforce through a private cause of action, and that a damages remedy was an appropriate form of redress. Last Term, *Butz* v. *Economou*, 438 U. S. 478 (1978), reaffirmed this holding, stating that "the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Id.*, at 504.

Today we hold that *Bivens* and *Butz* require reversal of the holding of the en banc Court of Appeals. Our inquiry proceeds in three stages. We hold first that, pretermitting the question whether respondent's conduct is shielded by the Speech or Debate Clause, petitioner asserts a constitutionally protected right; second, that petitioner has stated a cause of action which asserts this right; and third, that relief in damages constitutes an appropriate form of remedy.

A

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." In numerous decisions, this Court "has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *E. g.*, *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976); *Buckley* v. *Valeo*, 424 U. S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975); *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954)." *Vance* v. *Bradley*, 440 U. S. 93, 95 n. 1 (1979). "To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, 'classifications by gender must serve important governmental objectives and must be

substantially related to achievement of those objectives.' *Craig* v. *Boren*, 429 U. S. 190, 197 (1976)."[9] *Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977). The equal protection component of the Due Process Clause thus confers on petitioner a federal constitutional right[10] to be free from gender discrimination which cannot meet these requirements.[11]

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[9] Before it can be determined whether petitioner's Fifth Amendment right has been violated, therefore, inquiry must be undertaken into what "important governmental objectives," if any, are served by the gender-based employment of congressional staff. See n. 21, *infra*. We express no views as to the outcome of this inquiry.

[10] This right is personal; it is petitioner, after all, who must suffer the effects of such discrimination. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 690–693, n. 13 (1979); cf. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326 (1893).

[11] Respondent argues that the subject matter of petitioner's suit is nonjusticiable because judicial review of congressional employment decisions would necessarily involve a "lack of the respect due coordinate branches of government." *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). We disagree. While we acknowledge the gravity of respondent's concerns, we hold that judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1. The Clause provides that Senators and Representatives, "for any Speech or Debate in either House, . . . shall not be questioned in any other Place." It protects Congressmen for conduct necessary to perform their duties "within the 'sphere of legitimate legislative activity.'" *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 501 (1975). The purpose of the Clause is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States* v. *Brewster*, 408 U. S. 501, 507 (1972). Thus "[i]n the American governmental structure the clause serves the . . . function of reinforcing the separation of powers so deliberately established by the Founders." *United States* v. *Johnson*, 383 U. S. 169, 178 (1966). The Clause is therefore a paradigm example of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department." *Baker* v. *Carr*, *supra*, at 217. Since the Speech or Debate Clause speaks so directly to the separation-of-powers concerns raised by respondent, we conclude that if respondent is not shielded by the Clause, the question whether his dismissal of petitioner violated her Fifth Amend-

We inquire next whether petitioner has a cause of action to assert this right.

B

It is clear that the District Court had jurisdiction under 28 U. S. C. § 1331 (a) to consider petitioner's claim. *Bell* v. *Hood*, 327 U. S. 678 (1946). It is equally clear, and the en banc Court of Appeals so held, that the Fifth Amendment confers on petitioner a constitutional right to be free from illegal discrimination.[12] Yet the Court of Appeals concluded

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ment rights would, as we stated in *Powell* v. *McCormack*, 395 U. S. 486, 548–549 (1969), "require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due [a] coordinate branch of government,' nor does it involve an 'initial policy determination of a kind clearly for non-judicial discretion.' *Baker* v. *Carr*, 369 U. S. 186, at 217."

The en banc Court of Appeals did not decide whether the conduct of respondent was shielded by the Speech or Debate Clause. In the absence of such a decision, we also intimate no view on this question. We note, however, that the Clause shields federal legislators with absolute immunity "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967). Defenses based upon the Clause should thus ordinarily be given priority, since federal legislators should be exempted from litigation if their conduct is in fact protected by the Clause. We nevertheless decline to remand this case to the en banc Court of Appeals before we have decided whether petitioner's complaint states a cause of action, and whether a damages remedy is an appropriate form of relief. These questions are otherwise properly before us and may be resolved without imposing on respondent additional litigative burdens. Refusal to decide them at this time may actually increase these burdens.

[12] The restraints of the Fifth Amendment reach far enough to embrace the official actions of a Congressman in hiring and dismissing his employees. That respondent's conduct may have been illegal does not suffice to transform it into merely private action. "[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used." *Bivens*, 403 U. S., at 392. See *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 287–289 (1913).

that petitioner could not enforce this right because she lacked a cause of action. The meaning of this missing "cause of action," however, is far from apparent.

Almost half a century ago, Mr. Justice Cardozo recognized that a " 'cause of action' may mean one thing for one purpose and something different for another." *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–68 (1933).[13] The phrase apparently became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and suits in equity and simply required a plaintiff to include in his complaint "[a] statement of the facts constituting the cause of action . . . ."[14] 1848 N. Y. Laws, ch. 379, § 120 (2). By the first third of the 20th century, however, the phrase had become so encrusted with doctrinal complexity that the authors of the Federal Rules of Civil Procedure eschewed it altogether, requiring only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8 (a). See *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc.*, 133 F. 2d 187, 189 (CA2 1943). Nevertheless, courts and commentators have continued to use the phrase "cause of action" in the traditional sense established by the Codes to refer roughly to the alleged invasion of "recognized legal rights" upon which a litigant bases his claim for relief.[15]

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[13] See *United States* v. *Dickinson*, 331 U. S. 745, 748 (1947); Arnold, The Code "Cause of Action" Clarified by United States Supreme Court, 19 A. B. A. J. 215 (1933).

[14] See Clark, The Code Cause of Action, 33 Yale L. J. 817, 820 (1924); Blume, The Scope of a Civil Action, 42 Mich. L. Rev. 257 (1943).

[15] See, *e. g.*, *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186 (1954); 2A J. Moore, Federal Practice ¶ 8.13, pp. 1704–1705 (2d ed. 1975) ("Perhaps it is not entirely accurate to say, as one court has said, that 'it is only necessary to state a claim in the pleadings . . . and not a cause of action.' While the Rules have substituted 'claim' or 'claim for relief' in lieu of the older and troublesome term 'cause of action,' the pleading still must state a 'cause of action' in the sense that it must show 'that the pleader is

Larson v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 693 (1949).

This is not the meaning of the "cause of action" which the Court of Appeals below refused to imply from the Fifth Amendment, however, for the court acknowledged that petitioner had alleged an invasion of her constitutional right to be free from illegal discrimination.[16] Instead the Court of Appeals appropriated the meaning of the phrase "cause of action" used in the many cases in which this Court has parsed congressional enactments to determine whether the rights and obligations so created could be judicially enforced by a particular "class of litigants." *Cannon* v. *University of Chicago*, 441 U. S. 677, 688 (1979). *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975), for example, held that although "Congress' primary purpose in . . . creating the SIPC was . . . the protection of investors," and although investors were thus "the intended beneficiaries of the [Securities Investor Protection] Act [of 1970]," 84 Stat. 1636,

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entitled to relief.' It is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery") (footnotes omitted).

There was, of course, great controversy concerning the exact meaning of the phrase "cause of action" in the Codes. See 2 J. Moore, Federal Practice ¶ 2.06, p. 359 n. 26 (2d ed. 1978); J. Pomeroy, Code Remedies 459–466 (4th ed. 1904); Wheaton, The Code "Cause of Action": Its Definition, 22 Cornell L. Q. 1 (1936); Clark, *supra* n. 14, at 837.

[16] The Court of Appeals apparently found that petitioner lacked a "cause of action" in the sense that a cause of action would have been supplied by 42 U. S. C. § 1983. *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600 (1979), holds this Term that, although § 1983 serves "to ensure that an individual [has] a cause of action for violations of the Constitution," the statute itself "does not provide any substantive rights at all." *Id.*, at 617, 618. Section 1983, of course, provides a cause of action only for deprivations of constitutional rights that occur "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," and thus has no application to this case.

15 U. S. C. § 78aaa *et seq.*, investors nevertheless had no private cause of action judicially to compel SIPC "to commit its funds or otherwise to act for the protection" of investors. 421 U. S., at 418, 421. We held that under the Act only the Securities and Exchange Commission had a cause of action enabling it to invoke judicial authority to require SIPC to perform its statutory obligations. On the other hand, *Texas & N. O. R. Co.* v. *Railway & Steamship Clerks*, 281 U. S. 548 (1930), held that § 2 of the Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C. § 152, which provides that railroad employees be able to designate representatives "without interference, influence, or coercion," did not confer "merely an abstract right," but was judicially enforceable through a private cause of action.[17] 281 U. S., at 558, 567–568.

In cases such as these, the question is which class of litigants may enforce in court legislatively created rights or obligations. If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a "cause of action" under the statute, and that this cause of action is a necessary element of his "claim." So understood, the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. The concept of a "cause of action" is employed specifically to determine who may judicially enforce the statutory rights or obligations.[18]

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[17] *Texas & N. O. R. Co.* v. *Railway & Steamship Clerks* is now understood as having implied a "cause of action" although the opinion itself did not use the phrase. See *Cannon* v. *University of Chicago*, 441 U. S., at 690–693, n. 13.

[18] Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, see *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 384 (1884); *Montana-Dakota Utilities Co.* v. *Northwestern Public Serv. Co.*, 341 U. S. 246, 249 (1951); *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or

It is in this sense that the Court of Appeals concluded that petitioner lacked a cause of action. The Court of Appeals reached this conclusion through the application of the criteria set out in *Cort* v. *Ash*, 422 U. S. 66 (1975), for ascertaining whether a private cause of action may be implied from "a

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at least to overcome prudential limitations on federal-court jurisdiction, see *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975); *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies. See *Trainor* v. *Hernandez*, 431 U. S. 434, 440–443 (1977).

The Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action. See *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 465 n. 13 (1974). Although the court acknowledged the existence of petitioner's constitutional right, 571 F. 2d, at 797–798, it concluded that she had no cause of action in part because "the injury alleged here does not infringe this right as directly as the injury inflicted in the unreasonable search of Webster Bivens offended the fourth amendment." *Id.*, at 797. The nature of petitioner's injury, however, is relevant to the determination of whether she has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S., at 204. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978). And under the criteria we have set out, petitioner clearly has standing to bring this suit. If the allegations of her complaint are taken to be true, she has shown that she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979). Whether petitioner has asserted a cause of action, however, depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue. The focus must therefore be on the nature of the right petitioner asserts.

statute not expressly providing one." *Id.*, at 78.[19] The Court of Appeals used these criteria to determine that those in petitioner's position should not be able to enforce the Fifth Amendment's Due Process Clause, and that petitioner therefore had no cause of action under the Amendment. This was error, for the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions, see *Cort* v. *Ash*, *supra*, or other public causes of actions. See *Securities Investor Protection Corp.* v. *Barbour*, *supra*; *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 457 (1974). In each case, however, the question is the nature of the legislative intent informing a specific statute, and *Cort* set out the criteria through which this intent could be discerned.

The Constitution, on the other hand, does not "partake of the prolixity of a legal code." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). It speaks instead with a majestic simplicity. One of "its important objects," *ibid.*, is the designation of rights. And in "its great outlines," *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced. As James Madison stated when he presented the Bill of Rights to the Congress:

> "If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they

[19] See n. 8, *supra*.

> will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. "The very essence of civil liberty," wrote Mr. Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Traditionally, therefore, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do." *Bell* v. *Hood*, 327 U. S., at 684. See *Bivens*, 403 U. S., at 400 (Harlan, J., concurring in judgment). Indeed, this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right.[20] The plaintiffs in *Bolling* v. *Sharpe*, 347 U. S. 497

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[20] *Jacobs* v. *United States*, 290 U. S. 13 (1933), held that a plaintiff who alleged that his property had been taken by the United States for public

(1954), for example, claimed that they had been refused admission into certain public schools in the District of Columbia solely on account of their race. They rested their suit directly on the Fifth Amendment and on the general federal-question jurisdiction of the district courts, 28 U. S. C. § 1331. The District Court dismissed their complaint for failure "to state a claim upon which relief can be granted." Fed. Rule Civ. Proc. 12 (b)(6). This Court reversed. Plaintiffs were clearly the appropriate parties to bring such a suit, and this Court held that equitable relief should be made available. 349 U. S. 294 (1955).

Like the plaintiffs in *Bolling* v. *Sharpe*, *supra*, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. She claims that her rights under the Amendment have been violated, and that she has no effective means other than the judiciary to vindicate these rights.[21]

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use without just compensation could bring suit directly under the Fifth Amendment.

[21] Clause 9 of Rule XLIII of the House of Representatives prohibits sex discrimination as part of the Code of Official Conduct of the House:

"A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Clause 9 was adopted on January 14, 1975, see 121 Cong. Rec. 22, approximately six months after petitioner's discharge. In 1977, the House Commission on Administrative Review ("Obey Commission") termed "the anti-discrimination provisions of Rule XLIII . . . all but unenforceable." House Commission on Administrative Review, Recommendations and Rationales Concerning Administrative Units and Work Management, 95th Cong., 1st Sess., 53 (Comm. Print 1977). The Commission recommended the establishment of a Fair Employment Practices Panel to provide non-binding conciliation in cases of alleged violations of Clause 9. See H. Res. 766, 95th Cong., 1st Sess., § 504 (1977); Commission on Administrative Review, *supra*, at 52–53. This proposal was prevented from reaching the House floor, however, when the House defeated the Rule which

We conclude, therefore, that she is an appropriate party to invoke the general federal-question jurisdiction of the District Court to seek relief. She has a cause of action under the Fifth Amendment.[22]

Although petitioner has a cause of action, her complaint might nevertheless be dismissed under Rule 12 (b)(6) unless it can be determined that judicial relief is available. We therefore proceed to consider whether a damages remedy is an appropriate form of relief.

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would have governed consideration of the Obey Commission's resolution. See 123 Cong. Rec. 33435–33444 (Oct. 12, 1977).

On September 25, 1978, H. Res. 1380 was introduced calling for the implementation of Clause 9 through the creation of "a House Fair Employment Relations Board, a House Fair Employment Relations Office, and procedures for hearing and settling complaints alleging violations of Clause 9 of Rule XLIII . . . ." H. Res. 1380, 95th Cong., 2d Sess., § 2 (1978). H. Res. 1380 was referred to the House Committees on Administration and Rules, where it apparently languished. See 124 Cong. Rec. 31334 (Sept. 25, 1978). The House failed to consider it before adjournment.

There presently exists a voluntary House Fair Employment Practices Agreement. Members of the House who have signed the Agreement elect a House Fair Employment Practices Committee, which has authority to investigate cases of alleged discrimination among participating Members. The Committee has no enforcement powers.

[22] Five Courts of Appeals have implied causes of action directly under the Fifth Amendment. See *Apton* v. *Wilson*, 165 U. S. App. D. C. 22, 506 F. 2d 83 (1974); *Sullivan* v. *Murphy*, 156 U. S. App. D. C. 28, 478 F. 2d 938 (1973); *United States ex rel. Moore* v. *Koelzer*, 457 F. 2d 892 (CA3 1972); *Loe* v. *Armistead*, 582 F. 2d 1291 (CA4 1978), cert. pending *sub nom. Moffit* v. *Loe*, No. 78–1260; *States Marine Lines, Inc.* v. *Shultz*, 498 F. 2d 1146 (CA4 1974); *Green* v. *Carlson*, 581 F. 2d 669 (CA7 1978), cert. pending, No. 78–1261; *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F. 2d 1353 (CA9 1977), reversed in part and affirmed in part on other grounds *sub nom. Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391 (1979); *Bennett* v. *Campbell*, 564 F. 2d 329 (CA9 1977).

C

We approach this inquiry on the basis of established law. "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood,* 327 U. S., at 684. *Bivens,* 403 U. S., at 396, holds that in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are "no special factors counselling hesitation in the absence of affirmative action by Congress." See *Butz* v. *Economou,* 438 U. S., at 504.

First, a damages remedy is surely appropriate in this case. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens, supra,* at 395. Relief in damages would be judicially manageable, for the case presents a focused remedial issue without difficult questions of valuation or causation. See 403 U. S., at 409 (Harlan, J., concurring in judgment). Litigation under Title VII of the Civil Rights Act of 1964 has given federal courts great experience evaluating claims for backpay due to illegal sex discrimination. See 42 U. S. C. § 2000e–5 (g). Moreover, since respondent is no longer a Congressman, see n. 1, *supra,* equitable relief in the form of reinstatement would be unavailing. And there are available no other alternative forms of judicial relief. For Davis, as for Bivens, "it is damages or nothing." [23] *Bivens, supra,* at 410 (Harlan, J., concurring in judgment).

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[23] Respondent does not dispute petitioner's claim that she "has no cause of action under Louisiana law." Brief for Petitioner 19. See 3 CCH Employment Practices ¶ 23,548 (Aug. 1978). And it is far from clear that a state court would have authority to effect a damages remedy against a United States Congressman for illegal actions in the course of his official conduct, even if a plaintiff's claim were grounded in the United States Constitution. See *Tarble's Case,* 13 Wall. 397 (1872). Deference to

Second, although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause.[24] See n. 11, *supra*. If respondent's actions are not shielded by the Clause, we apply the principle that "legislators ought . . . generally to be bound by [the law] as are ordinary persons." *Gravel* v. *United States*, 408 U. S. 606, 615 (1972). Cf. *Doe* v. *McMillan*, 412 U. S. 306, 320 (1973). As *Butz* v. *Economou* stated only last Term:

> "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> " 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States* v. *Lee*, 106 U. S. [196,] 220 [(1882)]." 438 U. S., at 506.[25]

Third, there is in this case "no *explicit* congressional declara-

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state-court adjudication in a case such as this would in any event not serve the purposes of federalism, since it involves the application of the Fifth Amendment to a federal officer in the course of his federal duties. It is therefore particularly appropriate that a federal court be the forum in which a damages remedy be awarded.

[24] The reasoning and holding of *Bivens* is pertinent to the determination whether a federal court may provide a damages remedy. The question of the appropriateness of equitable relief in the form of reinstatement is not in this case, and we consequently intimate no view on that question.

[25] The decision of the panel of the Court of Appeals for the Fifth Circuit found that respondent was not foreclosed "from asserting the same qualified immunity available to other government officials. See generally *Wood* v. *Strickland*, 420 U. S. 308 . . . (1975); *Scheuer* v. *Rhodes*, 416 U. S. 232 . . . (1974)." 544 F. 2d 865, 881 (1977). The en banc Court of Appeals did not reach this issue, and accordingly we express no view concerning its disposition by the panel.

tion that persons" in petitioner's position injured by unconstitutional federal employment discrimination "may not recover money damages from" those responsible for the injury. *Bivens, supra,* at 397. (Emphasis supplied.) The Court of Appeals apparently interpreted § 717 of Title VII of the Civil Rights Act of 1964, 86 Stat. 111, 42 U. S. C. § 2000e–16, as an explicit congressional prohibition against judicial remedies for those in petitioner's position. When § 717 was added to Title VII to protect federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service.[26] See 42 U. S. C. § 2000e–16 (a). There is no evidence, however, that Congress meant § 717 to foreclose alternative remedies available to those not covered by the statute. Such silence is far from "the clearly discernible will of Congress" perceived by the Court of Appeals. 571 F. 2d, at 800. Indeed, the Court of Appeals' conclusion that § 717 permits judicial relief to be made available only to those who are protected by the statute is patently inconsistent with *Hampton* v. *Mow Sun Wong,* 426 U. S. 88 (1976), which held that equitable relief was available in a challenge to the constitutionality of Civil Service Commission regulations excluding aliens from federal employment. That § 717 does not prohibit discrimination on the basis of alienage [27] did not prevent *Hampton* from authorizing relief. In a similar manner, we do not now interpret § 717 to foreclose the judicial remedies of those expressly unprotected by the statute. On the contrary, § 717 leaves undisturbed whatever remedies petitioner might otherwise possess.

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[26] Since petitioner was not in the competitive service, see n. 2, *supra,* the remedial provisions of § 717 of Title VII are not available to her. In *Brown* v. *GSA,* 425 U. S. 820 (1976), we held that the remedies provided by § 717 are exclusive when those federal employees covered by the statute seek to redress the violation of rights guaranteed by the statute.

[27] Section 717 prohibits discrimination on the basis of "race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–16 (a).

Finally, the Court of Appeals appeared concerned that, if a damages remedy were made available to petitioner, the danger existed "of deluging federal courts with claims . . . ." 571 F. 2d, at 800. We do not perceive the potential for such a deluge. By virtue of 42 U. S. C. § 1983, a damages remedy is already available to redress injuries such as petitioner's when they occur under color of state law. Moreover, a plaintiff seeking a damages remedy under the Constitution must first demonstrate that his constitutional rights have been violated. We do not hold that every tort by a federal official may be redressed in damages. See *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963). And, of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated. See *Bivens*, 403 U. S., at 397. But perhaps the most fundamental answer to the concerns expressed by the Court of Appeals is that provided by Mr. Justice Harlan concurring in *Bivens:*

> "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Id.*, at 411.

We conclude, therefore, that in this case, as in *Bivens*, if petitioner is able to prevail on the merits, she should be able to redress her injury in damages, a "remedial mechanism normally available in the federal courts." *Id.*, at 397.

III

We hold today that the Court of Appeals for the Fifth Circuit, en banc, must be reversed because petitioner has a

cause of action under the Fifth Amendment, and because her injury may be redressed by a damages remedy. The Court of Appeals did not consider, however, whether respondent's conduct was shielded by the Speech or Debate Clause of the Constitution. Accordingly, we do not reach this question. And, of course, we express no opinion as to the merits of petitioner's complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

I dissent because, for me, the case presents very grave questions of separation of powers, rather than Speech or Debate Clause issues, although the two have certain common roots. Congress could, of course, make *Bivens*-type remedies available to its staff employees—and to other congressional employees—but it has not done so. On the contrary, Congress has historically treated its employees differently from the arrangements for other Government employees. Historically, staffs of Members have been considered so intimately a part of the policymaking and political process that they are not subject to being selected, compensated, or tenured as others who serve the Government. The vulnerability of employment on congressional staffs derives not only from the hazards of elections but also from the imperative need for loyalty, confidentiality, and political compatibility—not simply to a political party, an institution, or an administration, but to the individual Member.

A Member of Congress has a right to expect that every person on his or her staff will give total loyalty to the political positions of the Member, total confidentiality, and total support. This may, on occasion, lead a Member to employ a

particular person on a racial, ethnic, religious, or gender basis thought to be acceptable to the constituency represented, even though in other branches of Government—or in the private sector—such selection factors might be prohibited. This might lead a Member to decide that a particular staff position should be filled by a Catholic or a Presbyterian or a Mormon, a Mexican-American or an Oriental-American—or a woman rather than a man. Presidents consciously select—and dispense with—their appointees on this basis and have done so since the beginning of the Republic. The very commission of a Presidential appointee defines the tenure as "during the pleasure of the President."

Although Congress altered the ancient "spoils system" as to the Executive Branch and prescribed standards for some limited segments of the Judicial Branch, it has allowed its own Members, Presidents, and Judges to select their personal staffs without limit or restraint—in practical effect their tenure is "during the pleasure" of the Member.

At this level of Government—staff assistants of Members—long-accepted concepts of separation of powers dictate, for me, that until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed. The Court today encroaches on that barrier. Cf. *Sinking-Fund Cases*, 99 U. S. 700, 718 (1879).

In relation to his or her constituents, and in the performance of constitutionally defined functions, each Member of the House or Senate occupies a position in the Legislative Branch comparable to that of the President in the Executive Branch; and for the limited purposes of selecting personal staffs, their authority should be uninhibited except as Congress itself, or the Constitution, expressly provides otherwise.

The intimation that if Passman were still a Member of the House, a federal court could command him, on pain of contempt, to re-employ Davis represents an astonishing break with concepts of separate, coequal branches; I would categor-

ically reject the notion that courts have any such power in relation to the Congress.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Few questions concerning a plaintiff's complaint are more basic than whether it states a cause of action. The present case, however, involves a preliminary question that may be completely dispositive, for, as the Court recognizes, "the [Speech or Debate] Clause shields federal legislators with absolute immunity 'not only from the consequences of litigation's results but also from the burden of defending themselves.' *Dombrowski* v. *Eastland,* 387 U. S. 82, 85 (1967)." *Ante,* at 236 n. 11. See also *Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491, 503.

If, therefore, the respondent's alleged conduct was within the immunity of the Speech or Debate Clause, that is the end of this case, regardless of the abstract existence of a cause of action or a damages remedy. Accordingly, it seems clear to me that the first question to be addressed in this litigation is the Speech or Debate Clause claim—a claim that is far from frivolous.

I would vacate the judgment and remand the case to the Court of Appeals with directions to decide the Speech or Debate Clause issue.*

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Although I join the opinion of THE CHIEF JUSTICE, I write separately to emphasize that no prior decision of this Court justifies today's intrusion upon the legitimate powers of Members of Congress.

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*This issue was fully briefed and argued before the en banc Court of Appeals. The court's opinion gives no indication of why the court did not decide it.

The Court's analysis starts with the general proposition that "the judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced," *ante*, at 241. It leaps from this generalization, unexceptionable itself, to the conclusion that individuals who have suffered an injury to a constitutionally protected interest, and who lack an "effective" alternative, "*must* be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Ante*, at 242 (emphasis supplied). Apart from the dubious logic of this reasoning, I know of no precedent of this Court that supports such an absolute statement of the federal judiciary's obligation to entertain private suits that Congress has not authorized. On the contrary, I have thought it clear that federal courts must exercise a principled discretion when called upon to infer a private cause of action directly from the language of the Constitution. In the present case, for reasons well summarized by THE CHIEF JUSTICE, principles of comity and separation of powers should require a federal court to stay its hand.

To be sure, it has been clear—at least since *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)—that in appropriate circumstances private causes of action may be inferred from provisions of the Constitution.[1] But the exercise of this responsibility involves discretion, and a weighing of relevant concerns. As Mr. Justice Harlan observed in addressing this very point, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Id.*, at 407.

[1] A court necessarily has wider latitude in interpreting the Constitution than it does in construing a statute, *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). Moreover, the federal courts have a far greater responsibility under the Constitution for the protection of those rights derived directly from it, than for the definition and enforcement of rights created solely by Congress. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 407 (Harlan, J., concurring in judgment).

Among those policies that a court certainly should consider in deciding whether to imply a constitutional right of action is that of comity toward an equal and coordinate branch of government.[2] As Mr. Chief Justice Waite observed over a century ago: "One branch of government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking-Fund Cases*, 99 U. S. 700, 718 (1879). Even where the authority of one branch over a matter is not exclusive, so that a federal court properly may accept jurisdiction over the dispute, we have recognized that the principle of separation of powers continues to have force as a matter of policy. For example, in *United States* v. *Nixon*, 418 U. S. 683 (1974), we held on the one hand that the question whether the President had a claim of privilege as to conversations with his advisers was an issue to be resolved by the judiciary, and on the other hand that separation-of-powers considerations required the recognition of a qualified privilege.

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[2] It is settled that where discretion exists, a variety of factors rooted in the Constitution may lead a federal court to refuse to entertain an otherwise properly presented constitutional claim. See, *e. g.*, *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975); *Younger* v. *Harris*, 401 U. S. 37 (1971); *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341 (1951); *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943); *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941); *Hawks* v. *Hamill*, 288 U. S. 52 (1933). Traditionally, the issue has arisen in the context of a federal court's exercise of its equity powers with respect to the States. Concerns of comity similar to those that govern our dealings with the States also come into play when we are asked to interfere with the functioning of Congress.

The Court suggests that because the Speech or Debate Clause of the Constitution embodies a separation-of-powers principle, the Constitution affords no further protection to the prerogatives of Members of Congress. *Ante*, at. 246. This assertion not only marks a striking departure from precedent, but also constitutes a non sequitur. Our constitutional structure of government rests on a variety of checks and balances; the existence of one such check does not negate all others.

Whether or not the employment decisions of a Member of Congress fall within the scope of the Speech or Debate Clause of the Constitution, a question the Court does not reach today,[3] it is clear that these decisions are bound up with the conduct of his duties. As THE CHIEF JUSTICE observes, *ante*, at 249, a Congressman necessarily relies heavily on his personal staff in discharging the duties of his office. Because of the nature of his office, he must rely to an extraordinary extent on the loyalty and compatibility of everyone who works for him. Cf. *Elrod* v. *Burns*, 427 U. S. 347, 377–388 (1976) (POWELL, J., dissenting). A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence.

The foregoing would seem self-evident even if Congress had not indicated an intention to reserve to its Members the right to select, employ, promote, and discharge staff personnel without judicial interference. But Congress unmistakably has made clear its view on this subject. It took pains to exempt itself from the coverage of Title VII. Unless the Court is abandoning or modifying *sub silentio* our holding in *Brown* v. *GSA*, 425 U. S. 820 (1976), that Title VII, as amended, "provides the exclusive judicial remedy for claims of discrimination in federal employment," *id.*, at 835, the exemption from this statute for congressional employees should bar all judicial relief.

In sum, the decision of the Court today is not an exercise of principled discretion. It avoids our obligation to take into

[3] It is quite doubtful whether the Court should not consider respondent's Speech or Debate Clause claim as a threshold issue. The purpose of that Clause, when it applies, includes the protection of Members of Congress from the harassment of litigation. Since the Court chooses not to consider this claim, and addresses only the cause-of-action issue, I limit my dissent accordingly. In doing so, I imply no view as to the merits of the Speech or Debate Clause issue or to the propriety of not addressing the claim before all other issues.

account the range of policy and constitutional considerations that we would expect a legislature to ponder in determining whether a particular remedy should be enacted. It fails to weigh the legitimate interests of Members of Congress. Indeed, the decision simply ignores the constitutional doctrine of separation of powers. In my view, the serious intrusion upon the authority of Members of Congress to choose and control their own personal staffs cannot be justified.[4]

I would affirm the judgment of the Court of Appeals.

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[4] The justification the Court relies upon is the duty of federal courts to vindicate constitutional rights—a duty no one disputes. But it never has been thought that this duty required a blind exercise of judicial power without regard to other interests or constitutional principles. Indeed, it would not be surprising for Congress to consider today's action unwarranted and to exercise its authority to reassert the proper balance between the legislative and judicial branches. If the reaction took the form of limiting the jurisdiction of federal courts, the effect conceivably could be to frustrate the vindication of rights properly protected by the Court.

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS ET AL. *v.* FEENEY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 78–233. Argued February 26, 1979—Decided June 5, 1979

During her 12-year tenure as a state employee, appellee, who is not a veteran, had passed a number of open competitive civil service examinations for better jobs, but because of Massachusetts' veterans' preference statute, she was ranked in each instance below male veterans who had achieved lower test scores than appellee. Under the statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The statutory preference, which is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime," operates overwhelmingly to the advantage of males. Appellee brought an action in Federal District Court, alleging that the absolute-preference formula established in the Massachusetts statute inevitably operates to exclude women from consideration for the best state civil service jobs and thus discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. A three-judge court declared the statute unconstitutional and enjoined its operation, finding that while the goals of the preference were legitimate and the statute had not been enacted for the purpose of discriminating against women, the exclusionary impact upon women was so severe as to require the State to further its goals through a more limited form of preference. On an earlier appeal, this Court vacated the judgment and remanded the case for further consideration in light of the intervening decision in *Washington* v. *Davis*, 426 U. S. 229, which held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact and that, instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race. Upon remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the

employment opportunities of women were too inevitable to have been "unintended."

Held: Massachusetts, in granting an absolute lifetime preference to veterans, has not discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Pp. 271–281.

(a) Classifications based upon gender must bear a close and substantial relationship to important governmental objectives. Although public employment is not a constitutional right and the States have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause. Pp. 271–273.

(b) When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. Pp. 273–274.

(c) Here, the appellee's concession and the District Court's finding that the Massachusetts statute is not a pretext for gender discrimination are clearly correct. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly, or even rationally, be explained only as a gender-based classification. Significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. The distinction made by the Massachusetts statute is, as it seems to be, quite simply between veterans and nonveterans, not between men and women. Pp. 274–275.

(d) Appellee's contention that this veterans' preference is "inherently nonneutral" or "gender-biased" in the sense that it favors a status reserved under federal military policy primarily to men is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women; nor can it be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained, since the degree of the preference makes no constitutional difference. Pp. 276–278.

(e) While it would be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense

that they were not volitional or in the sense that they were not foreseeable, nevertheless "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women. Pp. 278–280.

(f) Although absolute and permanent preferences have always been subject to the objection that they give the veteran more than a square deal, the Fourteenth Amendment "cannot be made a refuge from ill-advised . . . laws." *District of Columbia* v. *Brooke*, 214 U. S. 138, 150. The substantial edge granted to veterans by the Massachusetts statute may reflect unwise policy, but appellee has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex. Pp. 280–281.

451 F. Supp. 143, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE, J., joined, *post*, p. 281. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 281.

Thomas R. Kiley, Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief were *Francis X. Bellotti*, Attorney General, and *Edward F. Vena*, Assistant Attorney General.

Richard P. Ward argued the cause for appellee. With him on the brief were *Stephen B. Perlman*, *Eleanor D. Acheson*, *John H. Mason*, and *John Reinstein*.*

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree*, *Deputy Solicitor General Easterbrook*, and *William C. Bryson* for the United States; and by *John J. Curtin, Jr.*, for the American Legion.

Samuel J. Rabinove and *Phyllis N. Segal* filed a brief for the National Organization for Women et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Deanne Siemer* for the United States

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute, Mass. Gen. Laws Ann., ch. 31, § 23, on the ground that it discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Under ch. 31, § 23,[1] all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates overwhelmingly to the advantage of males.

The appellee Helen B. Feeney is not a veteran. She brought this action pursuant to 42 U. S. C. § 1983, alleging that the absolute-preference formula established in ch. 31, § 23, inevitably operates to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denies them the equal protection of the laws.[2] The three-judge District Court agreed, one judge dissenting. *Anthony* v. *Massachusetts,* 415 F. Supp. 485 (Mass. 1976).[3]

Office of Personnel Management et al.; and by *Paul D. Kamenar* for the Washington Legal Foundation.

[1] For the text of ch. 31, § 23, see n. 10, *infra.* The general Massachusetts Civil Service law, Mass. Gen. Laws Ann., ch. 31, was recodified on January 1, 1979, 1978 Mass. Acts, ch. 393, and the veterans' preference is now found at Mass. Gen. Laws Ann., ch. 31, § 26 (West 1979). Citations in this opinion, unless otherwise indicated, are to the ch. 31 codification in effect when this litigation was commenced.

[2] No statutory claim was brought under Title VII of the Civil Rights Act of 1964, 42 U S. C. § 2000e *et seq.* Section 712 of the Act, 42 U. S. C. § 2000e–11, provides that "[n]othing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial or local law creating special rights or preference for veterans." The parties have evidently assumed that this provision precludes a Title VII challenge.

[3] The appellee's case had been consolidated with a similar action brought by Carol A. Anthony, a lawyer whose efforts to obtain a civil service Counsel I position had been frustrated by ch. 31, § 23. In 1975, Massachusetts exempted all attorney positions from the preference, 1975 Mass. Acts, ch. 134, and Anthony's claims were accordingly found moot by the District Court. *Anthony* v. *Massachusetts,* 415 F. Supp., at 495.

The District Court found that the absolute preference afforded by Massachusetts to veterans has a devastating impact upon the employment opportunities of women. Although it found that the goals of the preference were worthy and legitimate and that the legislation had not been enacted for the purpose of discriminating against women, the court reasoned that its exclusionary impact upon women was nonetheless so severe as to require the State to further its goals through a more limited form of preference. Finding that a more modest preference formula would readily accommodate the State's interest in aiding veterans, the court declared ch. 31, § 23, unconstitutional and enjoined its operation.[4]

Upon an appeal taken by the Attorney General of Massachusetts,[5] this Court vacated the judgment and remanded the case for further consideration in light of our intervening decision in *Washington* v. *Davis*, 426 U. S. 229. *Massachusetts* v. *Feeney*, 434 U. S. 884. The *Davis* case held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race. 426 U. S., at 238–244.

Upon remand, the District Court, one judge concurring and one judge again dissenting, concluded that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that

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[4] The District Court entered a stay pending appeal, but the stay was rendered moot by the passage of an interim statute suspending ch. 31, § 23, pending final judgment and replacing it with an interim provision granting a modified point preference to veterans. 1976 Mass. Acts, ch. 200, now codified at Mass. Gen. Laws Ann., ch. 31, § 26 (West 1979).

[5] The Attorney General appealed the judgment over the objection of other state officers named as defendants. In response to our certification of the question whether Massachusetts law permits this, see *Massachusetts* v. *Feeney*, 429 U. S. 66, the Supreme Judicial Court answered in the affirmative. *Feeney* v. *Commonwealth*, 373 Mass. 359, 366 N. E. 2d 1262 (1977).

the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended." Accordingly, the court reaffirmed its original judgment. *Feeney* v. *Massachusetts*, 451 F. Supp. 143. The Attorney General again appealed to this Court pursuant to 28 U. S. C. § 1253, and probable jurisdiction of the appeal was noted. 439 U. S. 891.

I

A

The Federal Government and virtually all of the States grant some sort of hiring preference to veterans.[6] The Massachusetts preference, which is loosely termed an "absolute lifetime" preference, is among the most generous.[7] It

[6] The first comprehensive federal veterans' statute was enacted in 1944. Veterans' Preference Act of 1944, 58 Stat. 387. The Federal Government has, however, engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. See, *e. g.*, Res. of Mar. 3, 1865, No. 27, 13 Stat. 571 (hiring preference for disabled veterans). See generally House Committee on Veterans' Affairs, The Provision of Federal Benefits for Veterans, An Historical Analysis of Major Veterans' Legislation, 1862–1954, 84th Cong., 1st Sess., 258–265 (Comm. Print 1955). For surveys of state veterans' preference laws, many of which also date back to the late 19th century, see State Veterans' Laws, Digests of State Laws Regarding Rights, Benefits, and Privileges of Veterns and Their Dependents, House Committee on Veterans' Affairs, 91st Cong., 1st Sess. (1969); Fleming & Shanor, Veterans Preferences in Public Employment: Unconstitutional Gender Discrimination?, 26 Emory L. J. 13 (1977).

[7] The forms of veterans' hiring preferences vary widely. The Federal Government and approximately 41 States grant veterans a point advantage on civil service examinations, usually 10 points for a disabled veteran and 5 for one who is not disabled. See Fleming & Shanor, *supra* n. 6, at 17, and n. 12 (citing statutes). A few offer only tie-breaking preferences. *Id.*, at n. 14 (citing statutes). A very few States, like Massachusetts, extend absolute hiring or positional preferences to qualified veterans. *Id.*, at n. 13. See, *e. g.*, N. J. Stat. Ann. § 11: 27–4 (West 1976); S. D. Comp. Laws Ann. § 3–3–1 (1974); Utah Code Ann. § 34–30–11 (1953); Wash. Rev. Code §§ 41.04.010, 73.16.010 (1976).

applies to all positions in the State's classified civil service, which constitute approximately 60% of the public jobs in the State. It is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime."[8] Persons who are deemed veterans and who are otherwise qualified for a particular civil service job may exercise the preference at any time and as many times as they wish.[9]

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[8] Massachusetts Gen. Laws Ann., ch. 4, § 7, Forty-third (West 1976), which supplies the general definition of the term "veteran," reads in pertinent part:

"'Veteran' shall mean any person, male or female, including a nurse, (*a*) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (*b*) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service . . . ."

Persons awarded the Purple Heart, ch. 4, § 7, Forty-third, or one of a number of specified campaign badges or the Congressional Medal of Honor are also deemed veterans. Mass. Gen. Laws Ann., ch. 31, § 26 (West 1979).

"Wartime service" is defined as service performed by a "Spanish War veteran," a "World War I veteran," a "World War II veteran," a "Korean veteran," a "Vietnam veteran," or a member of the "WAAC." Mass. Gen. Laws Ann., ch. 4, § 7, Forty-third (West 1976). Each of these terms is further defined to specify a period of service. The statutory definitions, taken together, cover the entire period from September 16, 1940, to May 7, 1975. See *ibid.*

"WAAC" is defined as follows: "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid.*

[9] The Massachusetts preference law formerly imposed a residency requirement, see 1954 Mass. Acts, ch. 627, § 3 (eligibility conditioned upon Massachusetts domicile prior to induction or five years' residency in State). The distinction was invalidated as violative of the Equal Protection Clause in *Stevens* v. *Campbell*, 332 F. Supp. 102, 105 (Mass. 1971). Cf. *August* v. *Bronstein*, 369 F. Supp. 190 (SDNY 1974) (up-

Civil service positions in Massachusetts fall into two general categories, labor and official. For jobs in the official service, with which the proofs in this action were concerned, the preference mechanics are uncomplicated. All applicants for employment must take competitive examinations. Grades are based on a formula that gives weight both to objective test results and to training and experience. Candidates who pass are then ranked in the order of their respective scores on an "eligible list." Chapter 31, § 23, requires, however, that disabled veterans, veterans, and surviving spouses and surviving parents of veterans be ranked—in the order of their respective scores—above all other candidates.[10]

Rank on the eligible list and availability for employment are the sole factors that determine which candidates are considered for appointment to an official civil service position. When a public agency has a vacancy, it requisitions a list of "certified eligibles" from the state personnel division. Under formulas prescribed by civil service rules, a small number of candidates from the top of an appropriate list, three if there is only one vacancy, are certified. The appointing agency

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holding, *inter alia*, nondurational residency requirement in New York veterans' preference statute), summarily aff'd, 417 U. S. 901.

[10] Chapter 31, § 23, provides in full:

"The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:—

"(1) Disabled veterans . . . in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B [the widow or widowed mother of a veteran killed in action or who died from a service-connected disability incurred in wartime service and who has not remarried] in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans."

A 1977 amendment extended the dependents' preference to "surviving spouses," and "surviving parents." 1977 Mass. Acts, ch. 815.

is then required to choose from among these candidates.[11] Although the veterans' preference thus does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a well-nigh absolute advantage.

B

The appellee has lived in Dracut, Mass., most of her life. She entered the work force in 1948, and for the next 14 years worked at a variety of jobs in the private sector. She first entered the state civil service system in 1963, having competed successfully for a position as Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. There she worked for four years. In 1967, she was promoted to the position of Federal Funds and Personnel Coordinator in the same agency. The agency, and with it her job, was eliminated in 1975.

During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans' preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. On the 1973 examination, she was placed in a position on the list behind 12 male veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.

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[11] A 1978 amendment requires the appointing authority to file a written statement of reasons if the person whose name was not highest is selected. 1978 Mass. Acts, ch. 393, § 11, currently codified at Mass. Gen. Laws Ann., ch. 31, § 27 (West 1979).

Ms. Feeney's interest in securing a better job in state government did not wane. Having been consistently eclipsed by veterans, however, she eventually concluded that further competition for civil service positions of interest to veterans would be futile. In 1975, shortly after her civil defense job was abolished, she commenced this litigation.

C

The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations.[12] See, *e. g.*, *Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 281 N. E. 2d 53 (1972). The Massachusetts law dates back to 1884, when the State, as part of its first civil service legislation, gave a statutory preference to civil service applicants who were Civil War veterans if their qualifications were equal to those of nonveterans. 1884 Mass. Acts, ch. 320, § 14 (sixth). This tie-breaking provision blossomed into a truly absolute preference in 1895, when the State enacted its first general veterans' preference law and exempted veterans from all merit selection requirements. 1895 Mass. Acts, ch. 501, § 2. In response to a challenge brought by a male nonveteran, this statute was declared violative of state constitutional provisions guaranteeing that government should be

[12] Veterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized. See, *e. g.*, *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (Minn. 1972), summarily aff'd, 410 U. S. 976; *August* v. *Bronstein*, *supra*; *Rios* v. *Dillman*, 499 F. 2d 329 (CA5 1974); cf. *Mitchell* v. *Cohen*, 333 U. S. 411, 419 n. 12. See generally Blumberg, De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment, 26 Buffalo L. Rev. 3 (1977). For a collection of early cases, see Annot., Veterans' Preference Laws, 161 A. L. R. 494 (1946).

for the "common good" and prohibiting hereditary titles. *Brown* v. *Russell,* 166 Mass. 14, 43 N. E. 1005 (1896).

The current veterans' preference law has its origins in an 1896 statute, enacted to meet the state constitutional standards enunciated in *Brown* v. *Russell.* That statute limited the absolute preference to veterans who were otherwise qualified.[13] A closely divided Supreme Judicial Court, in an advisory opinion issued the same year, concluded that the preference embodied in such a statute would be valid. *Opinion of the Justices,* 166 Mass. 589, 44 N. E. 625 (1896). In 1919, when the preference was extended to cover the veterans of World War I, the formula was further limited to provide for a priority in eligibility, in contrast to an absolute preference in hiring.[14] See *Corliss* v. *Civil Service Comm'rs,* 242 Mass. 61, 136 N. E. 356 (1922). In *Mayor of Lynn* v. *Commissioner of Civil Service,* 269 Mass. 410, 414, 169 N. E. 502, 503–504 (1929), the Supreme Judicial Court, adhering to the views expressed in its 1896 advisory opinion, sustained this statute against a state constitutional challenge.

Since 1919, the preference has been repeatedly amended to cover persons who served in subsequent wars, declared or

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[13] 1896 Mass. Acts, ch. 517, § 2. The statute provided that veterans who passed examinations should "be preferred in appointment to all persons not veterans . . . ." A proviso stated: "But nothing herein contained shall be construed to prevent the certification and employment of women."

[14] 1919 Mass. Acts, ch. 150, § 2. The amended statute provided that "the names of veterans who pass examinations . . . shall be placed upon the . . . eligible lists in the order of their respective standing, above the names of all other applicants," and further provided that "upon receipt of a requisition not especially calling for women, names shall be certified from such lists . . . ." The exemption for "women's requisitions" was retained in substantially this form in subsequent revisions, see, *e. g.,* 1954 Mass. Acts, ch. 627, § 5. It was eliminated in 1971, 1971 Mass. Acts, ch. 219, when the State made all single-sex examinations subject to the prior approval of the Massachusetts Commission Against Discrimination, 1971 Mass. Acts, ch. 221.

undeclared. See 1943 Mass. Acts, ch. 194; 1949 Mass. Acts, ch. 642, § 2 (World War II); 1954 Mass. Acts, ch. 627 (Korea); 1968 Mass. Acts, ch. 531, § 1 (Vietnam).[15] The current preference formula in ch. 31, § 23, is substantially the same as that settled upon in 1919. This absolute preference—even as modified in 1919—has never been universally popular. Over the years it has been subjected to repeated legal challenges, see *Hutcheson* v. *Director of Civil Service, supra* (collecting cases), to criticism by civil service reform groups, see, *e. g.*, Report of the Massachusetts Committee on Public Service on Initiative Bill Relative to Veterans' Preference, S. No. 279 (1926); Report of Massachusetts Special Commission on Civil Service and Public Personnel Administration 37–43 (June 15, 1967), and, in 1926, to a referendum in which it was reaffirmed by a majority of 51.9%. See *id.*, at 38. The present case is apparently the first to challenge the Massachusetts veterans' preference on the simple ground that it discriminates on the basis of sex.[16]

D

The first Massachusetts veterans' preference statute defined the term "veterans" in gender-neutral language. See

[15] A provision requiring public agencies to hire disabled veterans certified as eligible was added in 1922. 1922 Mass. Acts, ch. 463. It was invalidated as applied in *Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 281 N. E. 2d 53 (1972) (suit by veteran arguing that absolute preference for disabled veterans was arbitrary on facts). It has since been eliminated and replaced with a provision giving disabled veterans an absolute preference in retention. See Mass. Gen. Laws Ann., ch. 31, § 26 (West 1979). See n. 10, *supra*.

[16] For cases presenting similar challenges to the veterans' preference laws of other States, see *Ballou* v. *State Department of Civil Service*, 75 N. J. 365, 382 A. 2d 1118 (1978) (sustaining New Jersey absolute preference); *Feinerman* v. *Jones*, 356 F. Supp. 252 (MD Pa. 1973) (sustaining Pennsylvania point preference); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (ND Ill. 1976) (sustaining Illinois modified point preference); *Wisconsin Nat. Organization for Women* v. *Wisconsin*, 417 F. Supp. 978 (WD Wis. 1976) (sustaining Wisconsin point preference).

1896 Mass. Acts, ch. 517 § 1 ("a person" who served in the United States Army or Navy), and subsequent amendments have followed this pattern, see, *e. g.*, 1919 Mass. Acts, ch. 150, § 1 ("any person who has served . . ."); 1954 Mass Acts, ch. 627, § 1 ("any person, male or female, including a nurse"). Women who have served in official United States military units during wartime, then, have always been entitled to the benefit of the preference. In addition, Massachusetts, through a 1943 amendment to the definition of "wartime service," extended the preference to women who served in unofficial auxiliary women's units. 1943 Mass. Acts, ch. 194.[17]

When the first general veterans' preference statute was adopted in 1896, there were no women veterans.[18] The statute, however, covered only Civil War veterans. Most of them were beyond middle age, and relatively few were actively competing for public employment.[19] Thus, the impact of

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[17] The provision, passed shortly after the creation of the Women's Army Auxiliary Corps (WAAC), see n. 21, *infra*, is currently found at Mass. Gen. Laws Ann., ch. 4, § 7, cl. 43 (West 1976), see n. 8, *supra*. "Wartime service" is defined as service performed by a member of the "WAAC." A "WAAC" is "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Ibid.*

[18] Small numbers of women served in combat roles in every war before the 20th century in which the United States was involved, but usually unofficially or disguised as men. See M. Binkin & S. Bach, Women and the Military 5 (1977) (hereinafter Binkin and Bach). Among the better known are Molly Pitcher (Revolutionary War), Deborah Sampson (Revolutionary War), and Lucy Brewer (War of 1812). Passing as one "George Baker," Brewer served for three years as a gunner on the U. S. S. Constitution ("Old Ironsides") and distinguished herself in several major naval battles in the War of 1812. See J. Laffin, Women in Battle 116–122 (1967).

[19] By 1887, the average age of Civil War veterans in Massachusetts was already over 50. Massachusetts Civil Service Commissioners, Third Annual Report 22 (1887). The tie-breaking preference which had been established under the 1884 statute had apparently been difficult to enforce, since many appointing officers "prefer younger men." *Ibid.* The 1896

the preference upon the employment opportunities of non-veterans as a group and women in particular was slight.[20]

Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces,[21] and largely to the simple

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statute which established the first valid absolute preference, see *supra*, at 266, again covered only Civil War veterans. 1896 Mass. Acts, ch. 517, § 1.

[20] In 1896, for example, 2,804 persons applied for civil service positions: 2,031 were men, of whom only 32 were veterans; 773 were women. Of the 647 persons appointed, 525 were men, of whom only 9 were veterans; 122 were women. Massachusetts Civil Service Commissioners, Thirteenth Annual Report 5, 6 (1896). The average age of the applicants was 38. *Ibid.*

[21] The Army Nurse Corps, created by Congress in 1901, was the first official military unit for women, but its members were not granted full military rank until 1944. See Binkin and Bach 4–21; M. Treadwell, The Women's Army Corps 6 (Dept. of Army 1954) (hereinafter Treadwell). During World War I, a variety of proposals were made to enlist women for work as doctors, telephone operators, and clerks, but all were rejected by the War Department. See *ibid.* The Navy, however, interpreted its own authority broadly to include a power to enlist women as Yeoman F's and Marine F's. About 13,000 women served in this rank, working primarily at clerical jobs. These women were the first in the United States to be admitted to full military rank and status. See *id.*, at 10.

Official military corps for women were established in response to the massive personnel needs of World War II. See generally Binkin and Bach; Treadwell. The Women's Army Auxiliary Corps (WAAC)—the unofficial predecessor of the Women's Army Corps (WAC)—was created on May 14, 1942, followed two months later by the WAVES (Women Accepted for Voluntary Emergency Service). See Binkin and Bach 7. Not long after, the United States Marine Corps Women's Reserve and the Coast Guard Women's Reserve (SPAR) were established. See *ibid.* Some 350,000 women served in the four services; some 800 women also served as Women's Airforce Service Pilots (WASPS). *Ibid.* Most worked in health care, administration, and communications; they were also em-

fact that women have never been subjected to a military draft. See generally Binkin and Bach 4–21.

When this litigation was commenced, then, over 98% of the veterans in Massachusetts were male; only 1.8% were female. And over one-quarter of the Massachusetts population were veterans. During the decade between 1963 and 1973 when the appellee was actively participating in the State's merit selection system, 47,005 new permanent appointments were made in the classified official service. Forty-three percent of those hired were women, and 57% were men. Of the women appointed, 1.8% were veterans, while 54% of the men had veteran status. A large unspecified percentage of the female appointees were serving in lower paying positions for which males traditionally had not applied.[22]

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ployed as airplane mechanics, parachute riggers, gunnery instructors, air traffic controllers, and the like.

The authorizations for the women's units during World War II were temporary. The Women's Armed Services Integration Act of 1948, 62 Stat. 356, established the women's services on a permanent basis. Under the Act, women were given regular military status. However, quotas were placed on the numbers who could enlist, 62 Stat. 357, 360–361 (no more than 2% of total enlisted strength), eligibility requirements were more stringent than those for men, and career opportunities were limited. Binkin and Bach 11–12. During the 1950's and 1960's, enlisted women constituted little more than 1% of the total force. In 1967, the 2% quota was lifted, § 1 (9) (E), 81 Stat. 375, 10 U. S. C. § 3209 (b), and in the 1970's many restrictive policies concerning women's participation in the military have been eliminated or modified. See generally Binkin and Bach. In 1972, women still constituted less than 2% of the enlisted strength. *Id.*, at 14. By 1975, when this litigation was commenced, the percentage had risen to 4.6%. *Ibid.*

[22] The former exemption for "women's requisitions," see nn. 13, 14, *supra*, may have operated in the 20th century to protect these types of jobs from the impact of the preference. However, the statutory history indicates that this was not its purpose. The provision dates back to the 1896 veterans' preference law and was retained in the law substantially unchanged until it was eliminated in 1971. See n. 14, *supra*. Since veterans in 1896 were a small but an exclusively male class, such a pro-

On each of 50 sample eligible lists that are part of the record in this case, one or more women who would have been certified as eligible for appointment on the basis of test results were displaced by veterans whose test scores were lower.

At the outset of this litigation appellants conceded that for "many of the permanent positions for which males and females have competed" the veterans' preference has "resulted in a substantially greater proportion of female eligibles than male eligibles" not being certified for consideration. The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe. This impact lies at the heart of the appellee's federal constitutional claim.

II

The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.

A

The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 314. Most laws classify, and many affect certain groups

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vision was apparently included to ensure that the statute would not be construed to outlaw a pre-existing practice of single-sex hiring explicitly authorized under the 1884 Civil Service statute. See Rule XIX.3, Massachusetts Civil Service Law and Rules and Regulations of the Commissioners (1884) ("In case the request for any . . . certification, or any law or regulation, shall call for persons of one sex, those of that sex shall be certified; otherwise sex shall be disregarded in certification"). The veterans' preference statute at no point endorsed this practice. Historical materials indicate, however, that the early preference law may have operated to encourage the employment of women in positions from which they previously had been excluded. See Thirteenth Annual Report, *supra* n. 20, at 5, 6; Third Annual Report, *supra* n. 19, at 23.

unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. *New York City Transit Authority* v. *Beazer*, 440 U. S. 568; *Jefferson* v. *Hackney*, 406 U. S. 535, 548. Cf. *James* v. *Valtierra*, 402 U. S. 137. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. *Dandridge* v. *Williams*, 397 U. S. 471; *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. *Barrett* v. *Indiana*, 229 U. S. 26, 29–30; *Railway Express Agency* v. *New York*, 336 U. S. 106. When some other independent right is not at stake, see, *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618, and when there is no "reason to infer antipathy," *Vance* v. *Bradley*, 440 U. S. 93, 97, it is presumed that "even improvident decisions will eventually be rectified by the democratic process . . . ." *Ibid.*

Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown* v. *Board of Education*, 347 U. S. 483; *McLaughlin* v. *Florida*, 379 U. S. 184. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Guinn* v. *United States*, 238 U. S. 347; cf. *Lane* v. *Wilson*, 307 U. S. 268; *Gomillion* v. *Lightfoot*, 364 U. S. 339. But, as was made clear in *Washington* v. *Davis*, 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.

Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. *Caban* v. *Mohammed,* 441 U. S. 380, 398 (STEWART, J., dissenting). This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives, *Craig* v. *Boren,* 429 U. S. 190, 197, and are in many settings unconstitutional. *Reed* v. *Reed,* 404 U. S. 71;, *Frontiero* v. *Richardson,* 411 U. S. 677; *Weinberger* v. *Wiesenfeld,* 420 U. S. 636; *Craig* v. *Boren, supra; Califano* v. *Goldfarb,* 430 U. S. 199; *Orr* v. *Orr,* 440 U. S. 268; *Caban* v. *Mohammed, supra.* Although public employment is not a constitutional right, *Massachusetts Bd. of Retirement* v. *Murgia, supra,* and the States have wide discretion in framing employee qualifications, see, *e. g., New York City Transit Authority* v. *Beazer, supra,* these precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.

B

The cases of *Washington* v. *Davis, supra,* and *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. *Davis* upheld a job-related employment test that white people passed in proportionately greater numbers than Negroes, for there had been no showing that racial discrimination entered into the establishment or formulation of the test. *Arlington Heights* upheld a zoning board decision that tended to perpetuate racially segregated housing patterns,

since, apart from its effect, the board's decision was shown to be nothing more than an application of a constitutionally neutral zoning policy. Those principles apply with equal force to a case involving alleged gender discrimination.

When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra.* In this second inquiry, impact provides an "important starting point," 429 U. S., at 266, but purposeful discrimination is "the condition that offends the Constitution." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16.

It is against this background of precedent that we consider the merits of the case before us.

III

A

The question whether ch. 31, § 23, establishes a classification that is overtly or covertly based upon gender must first be considered. The appellee has conceded that ch. 31, § 23, is neutral on its face. She has also acknowledged that state hiring preferences for veterans are not *per se* invalid, for she has limited her challenge to the absolute lifetime preference that Massachusetts provides to veterans. The District Court made two central findings that are relevant here: first, that ch. 31, § 23, serves legitimate and worthy purposes; second, that the absolute preference was not established for the purpose of discriminating against women. The appellee has thus acknowledged and the District Court has thus found

that the distinction between veterans and nonveterans drawn by ch. 31, § 23, is not a pretext for gender discrimination. The appellee's concession and the District Court's finding are clearly correct.

If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral. See *Washington* v. *Davis,* 426 U. S., at 242; *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 266. But there can be but one answer to the question whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women.

Moreover, as the District Court implicitly found, the purposes of the statute provide the surest explanation for its impact. Just as there are cases in which impact alone can unmask an invidious classification, cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356, there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed. This is one. The distinction made by ch. 31, § 23, is, as it seems to be, quite simply between veterans and nonveterans, not between men and women.

B

The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. As did the District Court, she points to two basic factors which in her view distinguish ch. 31, § 23, from the neutral rules at issue in the *Washington* v. *Davis* and *Arlington Heights* cases. The first is the nature of the preference, which is said to be demonstrably gender-biased in the sense that it favors a status reserved under federal military policy primarily to men. The second concerns the impact of the absolute lifetime preference upon the employment opportunities of women, an impact claimed to be too inevitable to have been unintended. The appellee contends that these factors, coupled with the fact that the preference itself has little if any relevance to actual job performance, more than suffice to prove the discriminatory intent required to establish a constitutional violation.

1

The contention that this veterans' preference is "inherently nonneutral" or "gender-biased" presumes that the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans. There are two serious difficulties with this argument. First, it is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women. Second, it cannot be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained. Taken together, these difficulties are fatal.

To the extent that the status of veteran is one that few

women have been enabled to achieve, every hiring preference for veterans, however modest or extreme, is inherently gender-biased. If Massachusetts by offering such a preference can be said intentionally to have incorporated into its state employment policies the historical gender-based federal military personnel practices, the degree of the preference would or should make no constitutional difference. Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude.[23] Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not. The District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law. To reason that it was, by describing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.

To be sure, this case is unusual in that it involves a law that by design is not neutral. The law overtly prefers veterans as such. As opposed to the written test at issue in *Davis*, it does not purport to define a job-related characteristic. To the contrary, it confers upon a specifically described group—perceived to be particularly deserving—a competitive headstart. But the District Court found, and the appellee has not disputed, that this legislative choice was legitimate. The basic distinction between veterans and nonveterans, having been found not gender-based, and the goals of the

[23] This is not to say that the degree of impact is irrelevant to the question of intent. But it is to say that a more modest preference, while it might well lessen impact and, as the State argues, might lessen the effectiveness of the statute in helping veterans, would not be any more or less "neutral" in the constitutional sense.

preference having been found worthy, ch. 31 must be analyzed as is any other neutral law that casts a greater burden upon women as a group than upon men as a group. The enlistment policies of the Armed Services may well have discriminated on the basis of sex. See *Frontiero* v. *Richardson*, 411 U. S. 677; cf. *Schlesinger* v. *Ballard*, 419 U. S. 498. But the history of discrimination against women in the military is not on trial in this case.

2

The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

> "Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?" 451 F. Supp., at 151.

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 179 (concurring opinion).[24] It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[25] Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

To the contrary, the statutory history shows that the benefit of the preference was consistently offered to "any person" who was a veteran. That benefit has been extended to women under a very broad statutory definition of the term veteran.[26] The preference formula itself, which is the focal

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[24] Proof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266. The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, "the give and take of the situation." *Cramer* v. *United States*, 325 U. S. 1, 32–33 (Jackson, J.).

[25] This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch. 31, § 23, a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

[26] See nn. 8, 17, *supra*.

point of this challenge, was first adopted—so it appears from this record—out of a perceived need to help a small group of older Civil War veterans. It has since been reaffirmed and extended only to cover new veterans.[27] When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, see *Washington* v. *Davis*, 426 U. S., at 242, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.

IV

Veterans' hiring preferences represent an awkward—and, many argue, unfair—exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime, they inevitably have come to be viewed in many quarters as undemocratic and unwise.[28] Absolute and permanent preferences, as the troubled history of this law demonstrates, have always been subject to the objection that they give the vet-

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[27] The appellee has suggested that the former statutory exception for "women's requisitions," see nn. 13, 14, *supra*, supplies evidence that Massachusetts, when it established and subsequently reaffirmed the absolute-preference legislation, assumed that women would not or should not compete with men. She has further suggested that the former provision extending the preference to certain female dependents of veterans, see n. 10, *supra*, demonstrates that ch. 31, § 23, is laced with "old notions" about the proper roles and needs of the sexes. See *Califano* v. *Goldfarb*, 430 U. S. 199; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636. But the first suggestion is totally belied by the statutory history, see *supra*, at 267–271, and nn. 19, 20, and the second fails to account for the consistent statutory recognition of the contribution of women to this Nation's military efforts.

[28] See generally Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Post Office and Civil Service Committee, 95th Cong., 1st Sess. (1977); Report of Comptroller General, Conflicting Congressional Policies: Veterans' Preference and Apportionment vs. Equal Employment Opportunity (Sept. 29, 1977).

eran more than a square deal. But the Fourteenth Amendment "cannot be made a refuge from ill-advised . . . laws." *District of Columbia* v. *Brooke*, 214 U. S. 138, 150. The substantial edge granted to veterans by ch. 31, § 23, may reflect unwise policy. The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE joins, concurring.

While I concur in the Court's opinion, I confess that I am not at all sure that there is any difference between the two questions posed *ante*, at 274. If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination. However the question is phrased, for me the answer is largely provided by the fact that the number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged females (2,954,000)—to refute the claim that the rule was intended to benefit males as a class over females as a class.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Although acknowledging that in some circumstances, discriminatory intent may be inferred from the inevitable or foreseeable impact of a statute, *ante*, at 279 n. 25, the Court concludes that no such intent has been established here. I cannot agree. In my judgment, Massachusetts' choice of an absolute veterans' preference system evinces purposeful

gender-based discrimination. And because the statutory scheme bears no substantial relationship to a legitimate governmental objective, it cannot withstand scrutiny under the Equal Protection Clause.

I

The District Court found that the "prime objective" of the Massachusetts veterans' preference statute, Mass. Gen. Laws Ann., ch. 31, § 23, was to benefit individuals with prior military service. *Anthony* v. *Commonweath,* 415 F. Supp. 485, 497 (Mass. 1976). See *Feeney* v. *Massachusetts,* 451 F. Supp. 143, 145 (Mass. 1978). Under the Court's analysis, this factual determination "necessarily compels the conclusion that the State intended nothing more than to prefer 'veterans.' Given this finding, simple logic suggests than an intent to exclude women from significant public jobs was not at work in this law." *Ante,* at 277. I find the Court's logic neither simple nor compelling.

That a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that it also intends to disadvantage another. Individuals in general and lawmakers in particular frequently act for a variety of reasons. As this Court recognized in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 265 (1977), "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern." Absent an omniscience not commonly attributed to the judiciary, it will often be impossible to ascertain the sole or even dominant purpose of a given statute. See *McGinnis* v. *Royster,* 410 U. S. 263, 276–277 (1973); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1214 (1970). Thus, the critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment. Where there is

"proof that a discriminatory purpose has been *a* motivating factor in the decision, . . . judicial deference is no longer justified." *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 265–266 (emphasis added).

Moreover, since reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable. See *Beer* v. *United States,* 425 U. S. 130, 148–149, n. 4 (1976) (MARSHALL, J., dissenting); cf. *Palmer* v. *Thompson,* 403 U. S. 217, 224–225 (1971); *United States* v. *O'Brien,* 391 U. S. 367, 383–384 (1968). To discern the purposes underlying facially neutral policies, this Court has therefore considered the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available. See *Monroe* v. *Board of Commissioners,* 391 U. S. 450, 459 (1968); *Goss* v. *Board of Education,* 373 U. S. 683, 688–689 (1963); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *Griffin* v. *Illinois,* 351 U. S. 12, 17 n. 11 (1956). Cf. *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 425 (1975).

In the instant case, the impact of the Massachusetts statute on women is undisputed. Any veteran with a passing grade on the civil service exam must be placed ahead of a nonveteran, regardless of their respective scores. The District Court found that, as a practical matter, this preference supplants test results as the determinant of upper level civil service appointments. 415 F. Supp., at 488–489. Because less than 2% of the women in Massachusetts are veterans, the absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative. 451 F. Supp., at 151 (Campbell, J., concurring).

As the District Court recognized, this consequence follows foreseeably, indeed inexorably, from the long history of policies severely limiting women's participation in the military.[1]

[1] See *Anthony* v. *Massachusetts,* 415 F. Supp. 485, 490, 495–499 (Mass. 1976); *Feeney* v. *Massachusetts,* 451 F. Supp. 143, 145, 148 (Mass.

Although neutral in form, the statute is anything but neutral in application. It inescapably reserves a major sector of public employment to "an already established class which, as a matter of historical fact, is 98% male." *Ibid.* Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme. Cf. *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Washington* v. *Davis*, 426 U. S. 229, 241 (1976); *Alexander* v. *Louisiana*, 405 U. S. 625, 632 (1972); see generally Brest, *Palmer* v. *Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 123.

Clearly, that burden was not sustained here. The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations. Until 1971, the statute and implementing civil serv-

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1978). In addition to the 2% quota on women's participation in the Armed Forces, see *ante*, at 270 n. 21, enlistment and appointment requirements have been more stringent for females than males with respect to age, mental and physical aptitude, parental consent, and educational attainment. M. Binkin & S. Bach, Women and the Military (1977) (hereinafter Binkin and Bach); Note, The Equal Rights Amendment and the Military, 82 Yale L. J. 1533, 1539 (1973). Until the 1970's, the Armed Forces precluded enlistment and appointment of women, but not men, who were married or had dependent children. See 415 F. Supp., at 490; App. 85; Exs. 98, 99, 103, 104. Sex-based restrictions on advancement and training opportunities also diminished the incentives for qualified women to enlist. See Binkin and Bach 10–17; Beans, Sex Discrimination in the Military, 67 Mil. L. Rev. 19, 59–83 (1975). Cf. *Schlesinger* v. *Ballard*, 419 U. S. 498, 508 (1975).

Thus, unlike the employment examination in *Washington* v. *Davis*, 426 U. S. 229 (1976), which the Court found to be demonstrably job related, the Massachusetts preference statute incorporates the results of sex-based military policies irrelevant to women's current fitness for civilian public employment. See 415 F. Supp., at 498–499.

ice regulations exempted from operation of the preference any job requisitions "especially calling for women." 1954 Mass. Acts, ch. 627, § 5. See also 1896 Mass. Acts, ch. 517, § 6; 1919 Mass. Acts, ch. 150, § 2; 1945 Mass. Acts, ch. 725, § 2 (e); 1965 Mass. Acts, ch. 53; *ante*, at 266 nn. 13, 14. In practice, this exemption, coupled with the absolute preference for veterans, has created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions. See 415 F. Supp., at 488; 451 F. Supp., at 148 n. 9.

Thus, for over 70 years, the Commonwealth has maintained, as an integral part of its veterans' preference system, an exemption relegating female civil service applicants to occupations traditionally filled by women. Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid. See *Orr* v. *Orr*, 440 U. S. 268 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199, 210–211 (1977); *Stanton* v. *Stanton*, 421 U. S. 7, 14 (1975); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 645 (1975). Particularly when viewed against the range of less discriminatory alternatives available to assist veterans,[2] Massachusetts' choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral. Cf. *Albemarle Paper Co.* v. *Moody*, *supra*, at 425. The Court's conclusion to the contrary—that "nothing in the record" evinces a "collateral goal of keeping women in a stereotypic and predefined place in the

[2] Only four States afford a preference comparable in scope to that of Massachusetts. See Fleming & Shanor, Veterans' Preferences and Public Employment: Unconstitutional Gender Discrimination?, 26 Emory L. J. 13, 17 n. 13 (1977) (citing statutes). Other States and the Federal Government grant point or tie-breaking preferences that do not foreclose opportunities for women. See *id.*, at 13, and nn. 12, 14; *ante*, at 261 n. 7; Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess., 4 (1977) (statement of Alan Campbell, Chairman, United States Civil Service Commission).

Massachusetts Civil Service," *ante*, at 279—displays a singularly myopic view of the facts established below.[3]

II

To survive challenge under the Equal Protection Clause, statutes reflecting gender-based discrimination must be substantially related to the achievement of important governmental objectives. See *Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976); *Reed* v. *Reed*, 404 U. S. 71, 76 (1971). Appellants here advance three interests in support of the absolute-preference system: (1) assisting veterans in their readjustment to civilian life; (2) encouraging military enlistment; and (3) rewarding those who have served their country. Brief for Appellants 24. Although each of those goals is unquestionably legitimate, the "mere recitation of a benign, compensatory purpose" cannot of itself insulate legislative classifications from constitutional scrutiny. *Weinberger* v. *Wiesenfeld*, *supra*, at 648. And in this case, the Commonwealth has failed to establish a sufficient relationship between its objectives and the means chosen to effectuate them.

With respect to the first interest, facilitating veterans' transition to civilian status, the statute is plainly overinclusive. Cf. *Trimble* v. *Gordon*, 430 U. S. 762, 770–772 (1977); *Jimenez* v. *Weinberger*, 417 U. S. 628, 637 (1974). By conferring a permanent preference, the legislation allows veterans to invoke their advantage repeatedly, without regard to their date of discharge. As the record demonstrates, a substantial

[3] Although it is relevant that the preference statute also disadvantages a substantial group of men, see *ante*, at 281 (STEVENS, J., concurring), it is equally pertinent that 47% of Massachusetts men over 18 are veterans, as compared to 0.8% of Massachusetts women. App. 83. Given this disparity, and the indicia of intent noted *supra*, at 284–285, the absolute number of men denied preference cannot be dispositive, especially since they have not faced the barriers to achieving veteran status confronted by women. See n. 1, *supra*.

majority of those currently enjoying the benefits of the system are not recently discharged veterans in need of readjustment assistance.[4]

Nor is the Commonwealth's second asserted interest, encouraging military service, a plausible justification for this legislative scheme. In its original and subsequent re-enactments, the statute extended benefits retroactively to veterans who had served during a prior specified period. See *ante*, at 265–267. If the Commonwealth's "actual purpose" is to induce enlistment, this legislative design is hardly well suited to that end. See *Califano* v. *Webster*, *supra*, at 317; *Weinberger* v. *Wiesenfeld*, *supra*, at 648. For I am unwilling to assume what appellants made no effort to prove, that the possibility of obtaining an *ex post facto* civil service preference significantly influenced the enlistment decisions of Massachusetts residents. Moreover, even if such influence could be presumed, the statute is still grossly overinclusive in that it bestows benefits on men drafted as well as those who volunteered.

Finally, the Commonwealth's third interest, rewarding veterans, does not "adequately justify the salient features" of this preference system. *Craig* v. *Boren*, *supra*, at 202–203. See *Orr* v. *Orr*, *supra*, at 281. Where a particular statutory scheme visits substantial hardship on a class long subject to discrimination, the legislation cannot be sustained unless " 'carefully tuned to alternative considerations.' " *Trimble* v. *Gordon*, *supra*, at 772. See *Caban* v. *Mohammed*, 441 U. S. 380, 392–393, n. 13 (1979); *Mathews* v. *Lucas*, 427 U. S. 495 (1976). Here, there are a wide variety of less discriminatory means by which Massachusetts could effect its compensatory purposes. For example, a point preference system, such as that maintained by many States and the Federal Government,

[4] The eligibility lists for the positions Ms. Feeney sought included 95 veterans for whom discharge information was available. Of those 95 males, 64 (67%) were discharged prior to 1960. App. 106, 150–151, 169–170.

see n. 2, *supra*, or an absolute preference for a limited duration, would reward veterans without excluding all qualified women from upper level civil service positions. Apart from public employment, the Commonwealth, can, and does, afford assistance to veterans in various ways, including tax abatements, educational subsidies, and special programs for needy veterans. See Mass. Gen. Laws Ann., ch. 59, § 5, Fifth (West Supp. 1979); Mass. Gen. Laws Ann., ch. 69, §§ 7, 7B (West Supp. 1979); and Mass. Gen. Laws Ann., chs. 115, 115A (West 1969 and Supp. 1978). Unlike these and similar benefits, the costs of which are distributed across the taxpaying public generally, the Massachusetts statute exacts a substantial price from a discrete group of individuals who have long been subject to employment discrimination,[5] and who, "because of circumstances totally beyond their control, have [had] little if any chance of becoming members of the preferred class." 415 F. Supp., at 499. See n. 1, *supra*.

In its present unqualified form, the veterans' preference statute precludes all but a small fraction of Massachusetts women from obtaining any civil service position also of interest to men. See 451 F. Supp., at 151 (Campbell, J., concurring). Given the range of alternatives available, this degree of preference is not constitutionally permissible.

I would affirm the judgment of the court below.

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[5] See *Frontiero* v. *Richardson*, 411 U. S. 677, 689 n. 23 (1973); *Kahn* v. *Shevin*, 416 U. S. 351, 353–354 (1974); United States Bureau of the Census, Current Population Reports, No. 107, Money Income and Poverty Status of Families and Persons in the United States: 1976 (Advance Report) (Table 7) (Sept. 1977).

Syllabus

BABBITT, GOVERNOR OF ARIZONA, ET AL. *v.* UNITED FARM WORKERS NATIONAL UNION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 78-225. Argued February 21, 1979—Decided June 5, 1979

Appellees (a farmworkers' union, a union agent, farmworkers, and a union supporter) brought suit in Federal District Court in Arizona seeking a declaration of the unconstitutionality of various provisions of Arizona's farm labor statute, as well as of the entire statute, and an injunction against its enforcement. A three-judge court ruled unconstitutional on various grounds the provisions (1) specifying procedures for the election of employee bargaining representatives; (2) limiting union publicity directed at consumers of agricultural products; (3) imposing a criminal penalty for violations of the statute; (4) excusing an agricultural employer from furnishing a union any materials, information, time, or facilities to enable it to communicate with the employer's employees (access provision); and (5) governing arbitration of labor disputes, construed by the court as mandating compulsory arbitration. Deeming these provisions inseparable from the remainder of the statute, the court went on to declare the whole statute unconstitutional and enjoined its enforcement.

Held:

1. The challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions present a case or controversy, but the challenges to the access and arbitration provisions are not justiciable. Pp. 297-305.

(a) The fact that appellees have not invoked the election procedures provision in the past or expressed any intention to do so in the future, does not defeat the justiciability of their challenge in view of the nature of their claim that delays attending the statutory election scheme and the technical limitations on who may vote in unit elections severely curtail their freedom of association. To await appellees' participation in an election would not assist the resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all, and as this question is dispositive of appellees' challenge there is no warrant for postponing consideration of the election procedures claim. Pp. 299-301.

(b) With respect to appellees' claim that the consumer publicity provision (which on its face proscribes, as an unfair labor practice, dishonest, untruthful, and deceptive publicity) unconstitutionally penalizes inaccuracies inadvertently uttered, appellees have reason to fear prosecution for violation of the provision, where the State has not disavowed any intention of invoking the criminal penalty provision (which applies in terms to "[a]ny person . . . who violates any provision" of the statute) against unions that commit unfair labor practices. Accordingly, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision to present a case or controversy. For the same reasons, a case or controversy is also presented by appellees' claim that such provision unduly restricts protected speech by limiting publicity to that directed at agricultural products of an employer with whom a union has a primary dispute. Pp. 301–303.

(c) Where it is clear that appellees desire to engage in prohibited consumer publicity campaigns, their claim that the criminal penalty provision is unconstitutionally vague was properly entertained by the District Court and may be raised in this appeal. If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril. P. 303.

(d) Appellees' challenge to the access provision is not justiciable, where not only is it conjectural to anticipate that access will be denied but, more importantly, appellees' claim that such provision violates the First and Fourteenth Amendments because it deprives the state agency responsible for enforcing the statute of any discretion to compel agricultural employers to furnish the enumerated items, depends upon the attributes of the situs involved. An opinion on the constitutionality of the provision at this time would be patently advisory, and adjudication of the challenge must wait until appellees can assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused. Pp. 303–304.

(e) Similarly, any ruling on the allegedly compulsory arbitration provision would be wholly advisory, where the record discloses that there is no real and concrete dispute as to the application of the provision, appellees themselves acknowledging that employers may elect responses to an arguably unlawful strike other than seeking an injunction and agreeing to arbitrate, and appellees never having contested the constitutionality of the provision. Pp. 304–305.

2. The District Court properly considered the constitutionality of the election procedures provision even though a prior construction of the provision by the Arizona state courts was lacking, but the court should

have abstained from adjudicating the challenges to the consumer publicity and criminal penalty provisions until material unresolved questions of state law were determined by the Arizona courts. Pp. 305–312.

(a) A state-court construction of the election procedures provision would not obviate the need for decision of the constitutional issue or materially alter the question to be decided, as the resolution of the question whether such procedures are affected with a First Amendment interest at all is dispositive of appellees' challenge. P. 306.

(b) The criminal penalty provision might be construed broadly as applying to all provisions of the statute affirmatively proscribing or commanding courses of conduct, or narrowly as applying only to certain provisions susceptible of being "violated," but in either case the provision is reasonably susceptible of constructions that might undercut or modify appellees' vagueness attack or otherwise significantly alter the constitutional questions requiring resolution. Pp. 307–308.

(c) In view of the fact that the consumer publicity provision is patently ambiguous and subject to varying interpretations which would substantially affect the constitutional question presented, the District Court erred in entertaining all aspects of appellees' challenge to such provision without the benefit of a construction thereof by the Arizona courts. Pp. 308–312.

3. The District Court erred in invalidating the election procedures provision. Arizona was not constitutionally obliged to provide procedures pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate, and that it has undertaken to do so in an assertedly niggardly fashion, presents as a general matter no First Amendment problems. Moreover, the statute does not preclude voluntary recognition of a union by an agricultural employer. Pp. 312–314.

449 F. Supp. 449, reversed and remanded.

WHITE, J., delivered the opinion for the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 314.

Rex E. Lee, Special Assistant Attorney General of Arizona, argued the cause for appellants. With him on the briefs were *Robert Corbin*, Attorney General, *John A. LaSota, Jr.*, former Attorney General, *Charles E. Jones*, *Jon L. Kyl*, and *John B. Weldon, Jr.*

Jerome Cohen argued the cause for appellees. With him on the brief was *James Rutkowski.**

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case we review the decision of a three-judge District Court setting aside as unconstitutional Arizona's farm labor statute. The District Court perceived particular constitutional problems with five provisions of the Act; deeming these provisions inseparable from the remainder of the Act, the court declared the entire Act unconstitutional and enjoined its enforcement. We conclude that the challenges to two of the provisions specifically invalidated did not present a case or controversy within the jurisdiction of a federal court and hence should not have been adjudicated. Although the attacks on two other provisions were justiciable, we conclude that the District Court should have abstained from deciding the federal issues posed until material, unresolved questions of state law were determined by the Arizona courts. Finally, we believe that the District Court properly reached the merits of the fifth provision but erred in invalidating it. Acordingly, we reverse the judgment of the District Court.

I

In 1972, the Arizona Legislature enacted a comprehensive scheme for the regulation of agricultural employment relations. Arizona Agricultural Employment Relations Act, Ariz. Rev. Stat. Ann. §§ 23–1381 to 23–1395 (Supp. 1978). The

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**Joseph Herman* filed a brief for the Agricultural Producers Labor Committee et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Mark D. Rosenbaum, Fred Okrand,* and *Dennis M. Perluss* for the American Civil Liberties Union Foundation of Southern California et al.; and by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations.

Marvin J. Brenner and *Ellen Lake* filed a brief for the Agricultural Labor Relations Board as *amicus curiae.*

statute designates procedures governing the election of employee bargaining representatives, establishes various rights of agricultural employers and employees, proscribes a range of employer and union practices, and establishes a civil and criminal enforcement scheme to ensure compliance with the substantive provisions of the Act.

Appellees—the United Farm Workers National Union (UFW), an agent of the UFW, named farmworkers, and a supporter of the UFW—commenced suit in federal court to secure a declaration of the unconstitutionality of various sections of the Act, as well as of the entire Act, and an injunction against its enforcement.[1] A three-judge District Court was convened to entertain the action. On the basis of past instances of enforcement of the Act and in light of the provision for imposition of criminal penalties for "violat[ion of] any provision" of the Act, Ariz. Rev. Stat. Ann. § 23–1392 (Supp. 1978), the court determined that appellees' challenges were presently justiciable.[2] Reaching the merits of some of the

[1] The complaint asserted that the Act as a whole was invalid because it was pre-empted by the federal labor statutes, imposed an impermissible burden on commerce, denied appellees equal protection, and amounted to a bill of attainder. In addition, various constitutional challenges were made to one or more parts of 15 provisions of the Act.

[2] The District Court did not analyze section by section why a case or controversy existed with respect to each of the challenged sections. Rather, from instances of private and official enforcement detailed in a stipulation filed by the parties, the court concluded that the case was not "hypothetical, abstract, or generalized." 449 F. Supp. 449, 452 (Ariz. 1978). It did, however, focus specifically on § 23–1392. That provision makes it a crime to violate any other provision of the Act; and although the District Court deemed this section severable from the rest of the Act, it relied heavily on its conclusion that it had jurisdiction to adjudicate the validity of this section to justify its considering the constitutionality of other sections of the Act. See 449 F. Supp., at 454. In proceeding to do so, it ruled that evidence would be considered only in connection with § 23–1389 dealing with the election of bargaining representatives and with respect to § 23–1385 (C) limiting union access to employer properties, although evidence was introduced at trial relative to other provisions.

claims, the court ruled unconstitutional five distinct provisions of the Act.[3] Specifically, the court disapproved the section specifying election procedures, § 23–1389,[4] on the ground that, by failing to account for seasonal employment peaks, it precluded the consummation of elections before most workers dispersed and hence frustrated the associational rights of agricultural employees. The court was also of the view that the Act restricted unduly the class of employees technically eligible to vote for bargaining representatives and hence burdened the workers' freedom of association in this second respect.[5]

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[3] The court did not explain the basis for selecting from all of the challenges presented the five provisions on which it passed judgment.

[4] Section 23–1389 declares that representatives selected by a secret ballot for the purpose of collective bargaining by the majority of agricultural employees in an appropriate bargaining unit shall be the exclusive representatives of all agricultural employees in such unit for the purpose of collective bargaining. And it requires the Agricultural Employment Relations Board to ascertain the unit appropriate for purposes of collective bargaining. The section further provides that the Board shall investigate any petition alleging facts specified in § 23–1389 indicating that a question of representation exists and schedule an appropriate hearing when the Board has reasonable cause to believe that a question of representation does exist. If the hearing establishes that such a question exists, the Board is directed to order an election by secret ballot and to certify the results thereof. Section 23–1389 details the manner in which an election is to be conducted. The section further provides for procedures by which an employer might challenge a petition for an election. Additionally, § 23–1389 stipulates that no election shall be directed or conducted in any unit within which a valid election has been held in the preceding 12 months.

Section 23–1389 also sets down certain eligibility requirements regarding participation in elections conducted thereunder. And it imposes obligations on employers to furnish information to the Board, to be made available to interested unions and employees, concerning bargaining-unit employees qualified to vote. Finally, the section specifies procedures whereby agricultural employees may seek to rescind the representation authority of a union currently representing those employees.

[5] The election provision contemplates voting by "agricultural employees,"

The court, moreover, ruled violative of the First and Fourteenth Amendments the provision limiting union publicity directed at consumers of agricultural products, § 23–1385 (B)(8),[6] because as it construed the section, it proscribed innocent as well as deliberately false representations. The same section was declared infirm for the additional reason that it prohibited any consumer publicity, whether true or false, implicating a product trade name that "may include" agricultural products of an employer other than the employer with whom the protesting labor organization is engaged in a primary dispute.

The court also struck down the statute's criminal penalty provision, § 23–1392,[7] on vagueness grounds, and held unconstitutional the provision excusing the employer from furnishing to a labor organization any materials, information, time, or facilities to enable the union to communicate with the

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§ 23–1389 (A), which is defined in § 23–1382 (1) so as to exclude workers having only a brief history of employment with an agricultural employer.

[6] Section 23–1385 (B)(8) makes it an unfair labor practice for a labor organization or its agents:

"To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

[7] Section 23–1392 provides:

"Any person who knowingly resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a class 1 misdemeanor. The provisions of this section shall not apply to any activities carried on outside the state of Arizona."

employer's employees. § 23–1385 (C).[8] The court thought that the latter provision permitted employers to prevent access by unions to migratory farmworkers residing on their property, in violation of the guarantees of free speech and association.

Finally, the court disapproved a provision construed as mandating compulsory arbitration, § 23–1393 (B),[9] on the ground that it denied employees due process and the right to a jury trial, which the District Court found guaranteed by the Seventh Amendment. The remainder of the Act fell "by

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[8] Section 23–1385 (C) provides in part:

"No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents."

[9] Section 23–1393 (B) provides:

"In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption with a market value of five thousand dollars or more shall constitute commercial quantities."

reason of its inseparability and inoperability apart from the provisions found to be invalid." 449 F. Supp. 449, 467 (Ariz. 1978).

Appellants sought review by this Court of the judgment below. Because of substantial doubts regarding the justiciability of appellees' claims, we postponed consideration of our jurisdiction to review the merits. 439 U. S. 891 (1978). We now hold that, of the five provisions specifically invalidated by the District Court,[10] only the sections pertaining to election of bargaining representatives, consumer publicity, and imposition of criminal penalties are susceptible of judicial resolution at this time. We further conclude that the District Court should have abstained from adjudicating appellees' challenge to the consumer publicity and criminal penalty provisions, although we think the constitutionality of the election procedures was properly considered even lacking a prior construction by the Arizona courts. We are unable to sustain the District Court's declaration, however, that the election procedures are facially unconstitutional.

II

We address first the threshold question whether appellees have alleged a case or controversy within the meaning of Art. III of the Constitution or only abstract questions not currently justiciable by a federal court. The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test.

[10] Appellees challenged numerous provisions before the District Court not expressly considered by that court. After disapproving the five provisions that we address on this appeal, the court concluded that "there is obviously no need to rule on plaintiffs' other contentions including the claimed equal protection violation." 449 F. Supp., at 466. The court then enjoined enforcement of the Act in its entirety, finding the provisions not explicitly invalidated to be inseparable from those actually adjudicated. *Id.*, at 467. We find insufficient reason to consider in this Court in the first instance appellees' challenges to the provisions on which the District Court did not specifically pass judgment.

See *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93 (1945); see *Evers* v. *Dwyer*, 358 U. S. 202, 203 (1958); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, *supra*.

A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). But "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923); see *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 526 (1925).

When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974); see *Epperson* v. *Arkansas*, 393 U. S. 97 (1968); *Evers* v. *Dwyer*, *supra*, at 204. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). But "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger* v. *Harris*, 401 U. S. 37, 42 (1971); *Golden* v. *Zwickler*, 394 U. S. 103 (1969). When plaintiffs "do not claim that they have ever

been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to resolution by a federal court. *Younger* v. *Harris, supra,* at 42.

Examining the claims adjudicated by the three-judge court against the foregoing principles, it is our view that the challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions—but only those challenges—present a case or controversy.[11] As already noted, appellees' principal complaint about the statutory election procedures is that they entail inescapable delays and so preclude conducting an election promptly enough to permit participation by many farmworkers engaged in the production of crops having short seasons. Appellees also assail the assertedly austere limitations on who is eligible to participate in elections under the Act. Appellees admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future. But, as we see it, appellees' reluctance in this respect does not defeat the justiciability of their challenge in view of the nature of their claim.

Appellees insist that agricultural workers are constitutionally entitled to select representatives to bargain with their employers over employment conditions. As appellees read the statute, only representatives duly elected under its provisions may compel an employer to bargain with them. But

[11] Although appellants have contested the justiciability of appellees' several challenges to the Act's provisions, they have not contended that the standing of any particular appellee is more dubious than the standing of any other. We conclude that at least the UFW has a "sufficient 'personal stake' in a determination of the constitutional validity of [the three aforementioned provisions] to present 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character.'" *Buckley* v. *Valeo,* 424 U. S. 1, 12 (1976) (footnote omitted), quoting *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 241 (1937). See *NAACP* v. *Alabama,* 357 U. S. 449, 458 (1958). Accordingly, we do not assess the standing of the remaining appellees. See *Buckley* v. *Valeo, supra,* at 12.

appellees maintain, and have adduced evidence tending to prove, that the statutory election procedures frustrate rather than facilitate democratic selection of bargaining representatives. And the UFW has declined to pursue those procedures, not for lack of interest in representing Arizona farmworkers in negotiations with employers, but due to the procedures' asserted futility. Indeed, the UFW has in the past sought to represent Arizona farmworkers and has asserted in its complaint a desire to organize such workers and to represent them in collective bargaining. Moreover, the UFW has participated in nearly 400 elections in California under procedures thought to be amenable to prompt and fair elections. The lack of a comparable opportunity in Arizona is said to impose a continuing burden on appellees' associational rights.

Even though a challenged statute is sure to work the injury alleged, however, adjudication might be postponed until "a better factual record might be available." *Regional Rail Reorganization Act Cases, supra,* at 143. Thus, appellants urge that we should decline to entertain appellees' challenge until they undertake to invoke the Act's election procedures. In that way, the Court might acquire information regarding how the challenged procedures actually operate, in lieu of the predictive evidence that appellees introduced at trial.[12] We

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[12] Though waiting until appellees invoke unsuccessfully the statutory election procedures would remove any doubt about the existence of concrete injury resulting from application of the election provision, little could be done to remedy the injury incurred in the particular election. Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 333 n. 2 (1972); *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969); *Williams* v. *Rhodes,* 393 U. S. 23, 34–35 (1968). Justiciability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election. See, *e. g., Storer* v. *Brown,* 415 U. S. 724, 737 n. 8 (1974); *Rosario* v. *Rockefeller,* 410 U. S. 752, 756 n. 5 (1973); *Dunn* v. *Blumstein, supra,* at 333 n. 2. There is value in adjudicating election challenges notwithstanding

are persuaded, however, that awaiting appellees' participation in an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all. As we regard that question dispositive to appellees' challenge—as elaborated below—we think there is no warrant for postponing adjudication of the election claim.

Appellees' twofold attack on the Act's limitation on consumer publicity is also justiciable now. Section 23–1385 (B) (8) makes it an unfair labor practice "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity." And violations of that section may be criminally punishable. § 23–1392. Appellees maintain that the consumer publicity provision unconstitutionally penalizes inaccuracies inadvertently uttered in the course of consumer appeals.

The record shows that the UFW has actively engaged in consumer publicity campaigns in the past in Arizona, and appellees have alleged in their complaint an intention to continue to engage in boycott activities in that State. Although appellees do not plan to propagate untruths, they contend—as we have observed—that "erroneous statement is inevitable in free debate." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 271 (1964). They submit that to avoid criminal prosecution they must curtail their consumer appeals, and thus forgo full exercise of what they insist are their First Amendment rights. It is urged, accordingly, that their challenge to the limitation on consumer publicity plainly poses an actual case or controversy.

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the lapse of a particular election because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated *before* an election is held." *Storer* v. *Brown*, *supra*, at 737 n. 8 (emphasis added).

Appellants maintain that the criminal penalty provision has not yet been applied and may never be applied to commissions of unfair labor practices, including forbidden consumer publicity. But, as we have noted, when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Steffel* v. *Thompson*, 415 U. S., at 459. The consumer publicity provision on its face proscribes dishonest, untruthful, and deceptive publicity, and the criminal penalty provision applies in terms to "[a]ny person . . . who violates any provision" of the Act. Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity.[13] In our view, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision proscribing misrepresentations to present a case or controversy within the jurisdiction of the District Court.

Section 23–1385 (B)(8) also is said to limit consumer appeals to those directed at products with whom the labor organization involved has a primary dispute; as appellees construe it, it *proscribes* "publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name" Appellees challenge that limitation as unduly restricting protected speech. Ap-

[13] Even independently of criminal sanctions, § 23–1385 (B)(8) affirmatively prohibits the variety of consumer publicity specified therein. We think that the prospect of issuance of an administrative cease-and-desist order, § 23–1390 (C), or a court-ordered injunction, §§ 23–1390 (E), (J), (K), against such prohibited conduct provides substantial additional support for the conclusion that appellees' challenge to the publicity provision is justiciable.

pellees have in the past engaged in appeals now arguably prohibited by the statute and allege an intention to continue to do the same. For the reasons that appellees' challenge to the first aspect of the consumer publicity provision is justiciable, we think their claim directed against the second aspect may now be entertained as well.

We further conclude that the attack on the criminal penalty provision, itself, is also subject to adjudication at this time. Section 23–1392 authorizes imposition of criminal sanctions against "[a]ny person . . . who violates any provision" of the Act. Appellees contend that the penalty provision is unconstitutionally vague in that it does not give notice of what conduct is made criminal. Appellees aver that they have previously engaged, and will in the future engage, in organizing, boycotting, picketing, striking, and collective-bargaining activities regulated by various provisions of the Act.[14] They assert that they cannot be sure whether criminal sanctions may be visited upon them for pursuing any such conduct, much of which is allegedly constitutionally protected. As we have noted, it is clear that appellees desire to engage at least in consumer publicity campaigns prohibited by the Act; accordingly, we think their challenge to the precision of the criminal penalty provision, itself, was properly entertained by the District Court and may be raised here on appeal. If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril.

Appellees' challenge to the access provision, however, is not justiciable. The provision, § 23–1385 (C), stipulates that "[n]o employer shall be required to furnish or make available to a labor organization . . . information, time, or facilities to enable such . . . labor organization . . . to communicate with

[14] *E. g.*, § 23–1385 (C) (access to employer's property); § 23–1385 (B)(7) (boycotts); § 23–1385 (B)(12) (picketing and boycotts); § 23–1385 (B)(13) (striking by minorities); §§ 23–1384, 23–1385 (D) (collective bargaining).

employees of the employer, members of the labor organization, its supporters, or adherents." Appellees insist, and the District Court held, that this provision deprives the Arizona Employment Relations Board—charged with responsibility for enforcing the Act—of any discretion to compel agricultural employers to furnish materials, information, time, or facilities to labor organizations desirous of communicating with workers located on the employers' property and that the section for this reason violates the First and Fourteenth Amendments to the Constitution.

It may be accepted that the UFW will inevitably seek access to employers' property in order to organize or simply to communicate with farmworkers. But it is conjectural to anticipate that access will be denied. More importantly, appellees' claim depends inextricably upon the attributes of the situs involved. They liken farm labor camps to the company town involved in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), in which the First Amendment was held to operate. Yet it is impossible to know whether access will be denied to places fitting appellees' constitutional claim. We can only hypothesize that such an event will come to pass, and it is only on this basis that the constitutional claim could be adjudicated at this time. An opinion now would be patently advisory; the adjudication of appellees' challenge to the access provision must therefore await at least such time as appellees can assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused.

Finally, the constitutionality of the allegedly compulsory arbitration provision was also improperly considered by the District Court. That provision specifies that an employer may seek and obtain an injunction "upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the

resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities." § 23–1393 (B). If an employer invokes a court's jurisdiction to issue a temporary restraining order to enjoin a *strike*, the employer "must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues." And if the parties cannot agree on an arbitrator, the court must appoint one.

On the record before us, there is an insufficiently real and concrete dispute with respect to application of this provision. Appellees themselves acknowledge that, assuming an arguably unlawful strike will occur, employers may elect to pursue a range of responses other than seeking an injunction and agreeing to arbitrate. Moreover, appellees have never contested the constitutionality of the arbitration clause. They declare that "[t]he three judge court below on its own motion found the binding arbitration provision of § 1393 (B) violative of substantive due process and the Seventh Amendment." Brief for Appellees 71 n. 153. Appellees, instead, raised other challenges to the statute's civil enforcement scheme, which we do not consider on this appeal. See n. 10, *supra*. It is clear, then, that any ruling on the compulsory arbitration provision would be wholly advisory.

III

Appellants contend that, even assuming any of appellees' claims are justiciable, the District Court should have abstained from adjudicating those claims until the Arizona courts might authoritatively construe the provisions at issue. We disagree that appellees' challenge to the statutory election procedures should first be submitted to the Arizona courts, but we think that the District Court should have abstained from considering the constitutionality of the criminal

penalty provision and the consumer publicity provision pending review by the state courts.

As we have observed, " '[a]bstention . . . sanctions . . . escape [from immediate decision] only in narrowly limited "special circumstances." ' " *Kusper* v. *Pontikes*, 414 U. S. 51, 54 (1973), quoting *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 (1972). "The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." *Kusper* v. *Pontikes*, *supra*, at 54; see *Zwickler* v. *Koota*, 389 U. S. 241, 249 (1967); *Harrison* v. *NAACP*, 360 U. S. 167, 176–177 (1959); *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). Of course, the abstention doctrine "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U. S. 528, 534 (1965). But when the state statute at issue is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question," *id.*, at 535, abstention may be required "in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication," *id.*, at 534.

We think that a state-court construction of the provision governing election procedures would not obviate the need for decision of the constitutional issue or materially alter the question to be decided. As we shall discuss, our resolution of the question whether the statutory election procedures are affected with a First Amendment interest at all is dispositive of appellees' challenge. And insofar as it bears on that matter, the statute is pointedly clear. Accordingly, we perceive no basis for declining to decide appellees' challenge to the election procedures, notwithstanding the absence of a prior state-court adjudication.

We conclude, however, that the District Court should have postponed resolution of appellees' challenge to the criminal penalty provision. That section provides in pertinent part that "[a]ny person . . . who violates any provision of [the Act] is guilty of a . . . misdemeanor." § 23–1392. Appellees maintain that the penalty provision leaves substantial doubt regarding what activities will elicit criminal sanctions. The District Court so concluded, observing that "[c]onsidering the enormous variety of activities covered by the Act, [the penalty section] is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning." 449 F. Supp., at 453. The court elaborated: "There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment." *Ibid.*

Appellants, themselves, do not argue that the criminal penalty provision is unambiguous. Indeed, they insist that until the provision is enforced "it is impossible to know what will be considered a 'violatio[n]' of the Act." Brief for Appellants 37. Appellants submit that various unfair labor practices, for example, have not been treated as yet as criminal violations.

It is possible, however, that the penalty provision might be construed broadly as applying to all sections of the Act that affirmatively proscribe or command courses of conduct. In terms it reaches "[a]ny person . . . who violates any provision of" the Act. Alternatively, the Arizona courts might conclude that only limited portions of the Act are susceptible of being "violated" and thus narrowly define the reach of the penalty section. In either case, it is evident that the statute is reasonably susceptible of constructions that might undercut or modify appellees' vagueness attack. It may be that, if construed broadly, the penalty provision

would operate in conjunction with substantive provisions of the Act to restrict unduly the pursuit of First Amendment activities. But it is at least evident that an authoritative construction of the penalty provision may significantly alter the constitutional questions requiring resolution.[15]

We have noted, of course, that when "extensive adjudications, under the impact of a variety of factual situations, [would be required in order to bring a challenged statute] within the bounds of permissible constitutional certainty," abstention may be inappropriate. *Baggett* v. *Bullitt*, 377 U. S. 360, 378 (1964). But here the Arizona courts may determine in a single proceeding what substantive provisions the penalty provision modifies. In this case, the "uncertain issue of state law [turns] upon a choice between one or several alternative meanings of [the] state statute." *Ibid.* Accordingly, we think the Arizona courts should be "afforded a reasonable opportunity to pass upon" the section under review. *Harrison* v. *NAACP*, *supra*, at 176.

The District Court should have abstained with respect to appellees' challenges to the consumer publicity provision as well. Appellees have argued that Arizona's proscription of misrepresentations by labor organizations in the course of appeals to consumers intolerably inhibits the exercise of their

[15] The dissent suggests that § 23–1392 is unambiguous and needs no construction and that abstention is therefore improper. But the District Court invalidated § 23–1392 on vagueness grounds, and the State's position with respect to the issue is such that we are reluctant to conclude that appellees' challenge to § 23–1392 on vagueness grounds is without substance and hence that it contains no ambiguity warranting abstention.

If there were to be no abstention regarding § 23–1392 on the basis that it clearly criminalizes any departure from the command of any provision of the Act, adequate consideration of whether the section is unconstitutionally overbroad would require inquiry into whether some conduct prohibited by the Act is constitutionally shielded from criminal punishment. But that would entail dealing with the validity of provisions about which there may be no case or controversy or with respect to which abstention is the proper course.

First Amendment right freely to discuss issues concerning the employment of farm laborers and the production of crops. Appellants submit, however, that the statutory ban on untruthful consumer publicity might fairly be construed by an Arizona court as proscribing only misrepresentations made with knowledge of their falsity or in reckless disregard of truth or falsity. As that is the qualification that appellees insist the prohibition of misstatements must include, a construction to that effect would substantially affect the constitutional question presented.

It is reasonably arguable that the consumer publicity provision is susceptible of the construction appellants suggest. Section 23–1385 (B)(8) makes it unlawful "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by use of dishonest, untruthful *and* deceptive publicity." (Emphasis added.) On its face, the statute does not forbid the propagation of untruths without more. Rather, to be condemnable, consumer publicity must be "dishonest" and "deceptive" as well as untruthful. And the Arizona courts may well conclude that a "dishonest" and "untruthful" statement is one made with knowledge of falsity or in reckless disregard of falsity.[16]

[16] Although construing the section in this manner would apparently satisfy appellees, we should not be understood as declaring that the section and its criminal sanction would be unconstitutional if they proscribed damaging falsehoods perpetrated unknowingly or without recklessness. We have not adjudicated the role of the First Amendment in suits by private parties against nonmedia defendants, nor have we considered the constitutional implications of causes of action for injurious falsehoods outside the area of defamation and the ground covered by *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967). *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966), holding that application of state defamation remedies for speech uttered in a labor dispute is dependent upon a showing of knowledge or recklessness, was grounded in federal labor policy, though the case had constitutional overtones.

Furthermore, we express no view on whether the section would be

To be sure, the consumer publicity provision further provides that "[p]ermissible inducement or encouragement . . . means truthful, honest *and* nondeceptive publicity. . . ." (Emphasis added.) That phrase may be read to indicate that representations not having all three attributes are prohibited under the Act. But it could be held that the phrase denotes only that "truthful, honest and nondeceptive publicity" is permissible, not that any other publicity is prohibited. When read in conjunction with the prohibitory clause preceding it, the latter phrase thus introduces an ambiguity suitable for state-court resolution. In sum, we think adjudication of appellees' attack on the statutory limitation on untruthful consumer appeals should await an authoritative interpretation of that limitation by the Arizona courts.

We further conclude that the District Court should have abstained from adjudicating appellees' additional contention that the consumer publicity provision unconstitutionally precludes publicity not directed at the products of employers with whom the protesting labor organization has a primary dispute. We think it is by no means clear that the statute in fact *prohibits* publicity solely because it is directed at the products of particular employers. As already discussed, § 23–1385 (B)(8) declares it an unfair labor practice to induce or encourage the ultimate consumer of agricultural products to refrain from purchasing products "by the use of dishonest, untruthful and deceptive publicity." The provision then stipulates:

> "Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural prod-

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vulnerable to constitutional attack if it declared false consumer publicity, whether innocent or culpable, to be an unfair labor practice and had as its only sanction a prospective cease-and-desist order or court injunction directing that the defendant cease publishing material already determined to be false.

> uct produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

The section nowhere proscribes publicity directed at products of employers with whom a labor organization is not engaged in a primary dispute. It indicates only that publicity ranging beyond a primary disagreement is not accorded affirmative statutory protection The Arizona courts might reasonably determine that the language in issue does no more than that and might thus ameliorate appellees' concerns.[17]

Moreover, § 23–1385 (B)(8) might be construed, in light of § 23–1385 (C), to prohibit only threatening speech. The latter provision states in pertinent part that "[t]he expressing of any views, argument, opinion or the making of any statement . . . or the dissemination of such views whether in written, printed, graphic, visual or auditory form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair

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[17] Were the section construed to prohibit all appeals directed against the products of agricultural employers whose employees the labor organization did not actually represent, its constitutionality would be substantially in doubt. Even picketing may not be so narrowly circumscribed. *AFL* v. *Swing*, 312 U. S. 321 (1941). Additional difficulties would arise were the section interpreted to intercept publicity by means other than picketing. Although we have previously concluded that picketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution, *Carpenters* v. *Ritter's Cafe*, 315 U. S. 722 (1942); cf. *NLRB* v. *Fruit Packers*, 377 U. S. 58 (1964), we have noted that, for First Amendment purposes, picketing is qualitatively "different from other modes of communication." *Hughes* v. *Superior Court*, 339 U. S. 460, 465 (1950); see *Buckley* v. *Valeo*, 424 U. S., at 17; *Teamsters* v. *Vogt, Inc.*, 354 U. S. 284 (1957).

labor practice . . . ." On its face, § 23–1385 (C) would appear to qualify § 23–1385 (B)(8), as the latter identifies "an unfair labor practice for a labor organization or its agents." Were the consumer publicity provision interpreted to intercept only those expressions embodying a threat of force, the issue of its constitutional validity would assume a character wholly different from the question posed by appellees' construction.

Thus, we conclude that the District Court erred in entertaining all aspects of appellees' challenge to the consumer publicity section without the benefit of a construction thereof by the Arizona courts. We are sensitive to appellees' reluctance to repair to the Arizona courts after extensive litigation in the federal arena. We nevertheless hold that in this case the District Court should not have adjudicated substantial constitutional claims with respect to statutory provisions that are patently ambiguous on their face.[18]

IV

The merits of appellees' challenge to the statutory election procedures remain to be considered. Appellees contend, and the District Court concluded, that the delays assertedly attending the statutory election scheme and the technical limitations on who may vote in unit elections severely curtail appellees' freedom of association. This freedom, it is said, entails the liberty not only to join or sustain a labor union and collectively to express a position to an agricultural employer, but also to create or elect an organization entitled to invoke the statutory provision requiring an employer to bargain collectively with the certified representative of his em-

[18] It has been suggested that the impact of abstention on appellees' pursuit of constitutionally protected activities should be reduced by directing the District Court to protect appellees against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts. See *Harrison* v. *NAACP*, 360 U. S. 167, 178–179 (1959). But this is a matter that is best addressed by the District Court in the first instance.

ployees. As we see it, however, these general complaints that the statutory election procedures are ineffective are matters for the Arizona Legislature and not the federal courts.

Accepting that the Constitution guarantees workers the right individually or collectively to voice their views to their employers, see *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410 (1979); cf. *Madison School Dist.* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 173–175 (1976), the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen. Accordingly, Arizona was not constitutionally obliged to provide a procedure pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate. That it has undertaken to do so in an assertedly niggardly fashion, then, presents as a general matter no First Amendment problems.[19] Moreover, the Act does not preclude voluntary recognition of a labor organization by an agricultural employer. Thus, in the event that an employer desires to bargain with a representative chosen by his employees independently of the statutory election procedures, such bargaining may readily occur. The statutory procedures need be pursued only if farmworkers desire to designate exclusive bargaining representatives and to compel their employer to bargain—rights that are conferred by statute rather than the Federal Constitution. Accordingly, at this time, we are unable to discern any First Amendment difficulty with the Arizona statutory

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[19] We do not consider whether the election procedures deny any of the appellees equal protection of the law. Although appellees have challenged other provisions of the Act on equal protection grounds, they have not directed such an argument in this Court against the section governing election procedures. We understand appellees' equal protection challenge to embrace the sections pertaining to access to an employer's property and consumer publicity. But we have determined that appellees' assault on the first provision is premature and that appellees' attack on the second should be held in abeyance pending resort to the Arizona courts.

election scheme, whether or not the procedures are as fair or efficacious as appellees would like.

Reversed and remanded.

MR. JUSTICE BRENNAN with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the opinion of the Court, with the exception that I respectfully dissent from the Court's holding that the District Court should have abstained and postponed resolution of appellees' constitutional challenge to § 23–1392, Ariz. Rev. Stat. Ann. (Supp. 1978), until this statutory provision had been construed by the Arizona courts.

It must be stressed that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. . . .' *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188–189 (1959)." *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813 (1976). If a state statute is susceptible of a construction that would avoid or significantly alter a constitutional issue, however, abstention is appropriate to avoid needless friction "between federal pronouncements and state policies." *Reetz* v. *Bozanich*, 397 U. S. 82, 87 (1970). But, as the Court today correctly points out, the state statute at issue must be " '*fairly* subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question,' [*Harman* v. *Forssenius*, 380 U. S. 528,] 535 [1965]." *Ante*, at 306. (Emphasis supplied.) This is not the case with § 23–1392.[1]

Section 23–1392 provides in part:

"Any person who . . . violates any provision of this

[1] Because of the ambiguous relationship between § 23–1385 (C) and § 23–1385 (B) (8), I concur in the Court's holding that the District Court should have abstained with respect to § 23–1385 (B) (8).

> article is guilty of a . . . misdemeanor. The provisions of this section shall not apply to any activities carried on outside the state of Arizona."

The District Court concluded concerning this provision that "[i]t would appear on [its] face . . . that it cuts across and covers the entire [Arizona Agricultural Employment Relations] Act, not just a limited area where a criminal penalty might be acceptable. It says in plain English that it applies to 'any person' and further [that] any person 'who violates any provision of this article is guilty of a misdemeanor . . . .'" 449 F. Supp. 449, 453 (Ariz. 1978). The District Court found the provision unconstitutionally overbroad.[2] *Ibid.*

The District Court is clearly correct that the language of § 23–1392 is "plain and unambiguous."[3] *Davis* v. *Mann*, 377 U. S. 678, 690 (1964). The statute is not "obviously susceptible of a limiting construction" that would avoid the federal constitutional question reached by the District Court. *Zwickler* v. *Koota*, 389 U. S. 241, 251 n. 14 (1967). Of course, as every attorney knows, *any* statutory provision can be made

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[2] The District Court also found § 23–1392 to be "unconstitutionally vague." 449 F. Supp., at 453. The Court stated:

"Considering the enormous variety of activities covered by the Act, and the fact that . . . many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning.

. . . . . .

"There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment." *Ibid.*

[3] The fact that § 23–1392 is, for purposes of the abstention doctrine, "plain and unambiguous," does not necessarily mean that it cannot be unconstitutionally vague for purposes of the Due Process Clause of the Fourteenth Amendment. The section may plainly and unambiguously create criminal sanctions for violations of sections of the Act which, considered as criminal prohibitions, would be unconstitutionally vague.

ambiguous through a sufficiently assiduous application of legal discrimination. The Court resorts to such lawyerly legerdemain when it concludes that abstention is appropriate because Arizona courts might perhaps find "that only limited portions of the [Agricultural Employment Relations] Act are susceptible of being 'violated' and thus narrowly define the reach of the penalty section." *Ante*, at 307. But the potential ambiguity which the Court thus reads into § 23–1392 does not derive from the plain words of the statute. It is simply the Court's own invention, not an uncertainty that is "fairly" in the statute.[4]

Abstention is particularly inappropriate with respect to § 23–1392 because the provision impacts so directly on precious First Amendment rights. The statute creates sanctions for violations of the provisions of the Agricultural Employment Relations Act that regulate the speech of employees and employers.[5] This potential impairment of First Amendment

[4] Even if the statute were ambiguous in the manner suggested by the Court, abstention would still be inappropriate. It is extraordinarily unlikely that, in a statute as complex and far ranging as this Act, a single adjudication could definitively specify the exact reach of § 23–1392. In such circumstances, we have held that a federal court should not abstain from exercising its jurisdiction. As we stated in *Procunier* v. *Martinez*, 416 U. S. 396, 401 n. 5 (1974):

"Where . . . , as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. [*Baggett* v. *Bullitt*, 377 U. S. 360,] 378 [1964]. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require 'extensive adjudications, under the impact of a variety of factual situations,' to bring the challenged statute or regulation 'within the bounds of permissible constitutional certainty.' *Ibid.*"

[5] Section 1385 (B)(8), for example, makes it an unfair labor practice "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Per-

interests strongly counsels against abstention. "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the 'special circumstances,' *Propper* v. *Clark,* 337 U. S. 472, prerequisite to its application must be made on a case-by-case basis. *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, 500; *NAACP* v. *Bennett,* 360 U. S. 471." *Baggett* v. *Bullitt,* 377 U. S. 360, 375 (1964). Relevant to the exercise of this equitable discretion, are "the constitutional deprivation alleged and the probable consequences of abstaining." *Harman* v. *Forssenius,* 380 U. S. 528, 537 (1965). "This Court often has remarked that the equitable practice of abstention is limited by considerations of ' "the delay and expense to which application of the abstention doctrine inevitably gives rise." ' *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S., at 509, quoting *England* v. *Medical Examiners,* 375 U. S. 411, 418 (1964)." *Bellotti* v. *Baird,* 428 U. S. 132, 150 (1976). Therefore, when "constitutionally protected rights of speech and association," *Baggett* v. *Bullitt, supra,* at 378, are at stake, abstention becomes especially inappropriate. This is because "[i]n such [a] case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler* v. *Koota, supra,* at 252.

Even assuming that appellees have the financial resources to pursue this case through the Arizona courts, appellees may

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missible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name." Section 23–1392 makes violation of § 23–1385 (B) (8) a crime.

well avoid speech that is perhaps constitutionally protected throughout the long course of that litigation, because such speech might fall within the cold shadow of criminal liability.[6] The potential for this self-censorship is abhorrent to the First Amendment. It should be permitted by a court in equity only for the most important of reasons. It cannot be tolerated on the basis of the slender ambiguity which the Court has managed to create in this statute. Abstention on this issue is therefore manifestly unjustified.[7]

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[6] Appellees may be deterred from constitutionally protected speech even if the regulations which the Agricultural Employment Relations Act otherwise imposes on their speech are permissible under the First Amendment. This is because criminal sanctions discourage speech much more powerfully than do administrative regulations. Such sanctions would thus be more apt to cause employers and employees to "steer far wider of the unlawful zone," *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958), and more likely to contract the "breathing space" necessary for the survival of "First Amendment freedoms." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). For this reason, it does not follow that because the First Amendment permits certain speech to be regulated, it must also permit such speech to be punished. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 348–350 (1974).

[7] Because of the First Amendment interests involved, my view is that the District Court on remand should issue an injunction "to protect appellees against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts. See *Harrison* v. *NAACP*, 360 U. S. 167, 178–179 (1959)." *Ante*, at 312 n. 18.

LO-JI SALES, INC. *v.* NEW YORK

CERTIORARI TO THE APPELLATE TERM, SUPREME COURT OF NEW YORK, NINTH AND TENTH JUDICIAL DISTRICTS

No. 78-511. Argued April 16, 1979—Decided June 11, 1979

A New York State Police investigator, after purchasing two films from petitioner's "adult" bookstore and after viewing them and concluding that they violated state obscenity laws, took the films to a Town Justice, who also viewed the films. Based on the investigator's affidavit, the justice issued a warrant authorizing the search of the store and the seizure of other copies of the two films. The investigator's affidavit also asserted that "similar" films and printed matter portraying similar activities could be found on the premises and requested that the justice accompany the investigator in executing the warrant so that the justice might determine independently if any other items at the store were possessed in violation of law and subject to seizure. The justice included in the warrant a recital that authorized the seizure of "[t]he following items which the Court independently [on examination] has determined to be possessed in violation" of law. However, at the time the justice signed the warrant no items were listed or described following this statement. The justice also signed a warrant for the arrest of the store clerk for having sold the two films to the investigator. Thereafter, the justice, the investigator, and nine other law enforcement officials entered the bookstore, arrested the clerk (the only employee present), and advised him of the search warrant; they conducted a search that lasted nearly six hours, covering various areas of the store, and examined and seized numerous films, projectors, and magazines. The seized items were inventoried at a State Police barracks and each item was then listed by the police on the search warrant. Petitioner was charged with obscenity in the second degree. The trial court denied petitioner's pretrial motion to suppress the evidence as having been searched for and seized in violation of the First, Fourth, and Fourteenth Amendments; petitioner then entered a guilty plea. As permitted by New York law, petitioner appealed the denial of the motion to suppress, and the convictions were affirmed.

Held:

1. The Fourth Amendment does not permit the action taken here, where, except for the specification of copies of the two films previously

purchased by the investigator, the warrant did not purport to particularly describe the things to be seized but, instead, left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not countenance open-ended warrants to be completed while a search is being conducted and items seized or after the seizure has been carried out. Pp. 325–326.

2. The Town Justice's presence and participation in the search did not ensure that no items would be seized absent probable cause to believe that they were obscene; nor did his presence provide an immediate adversary hearing on the issue. The justice conducted a generalized search and was not acting as a neutral and detached judicial officer. This procedure is not authorized by *Heller* v. *New York*, 413 U. S. 483. Here, the Town Justice undertook to telescope the processes of the application for a warrant, the issuance of the warrant, and its execution. Pp. 326–328.

3. The actions involved here cannot be justified on the theory that because the items at issue were displayed in areas of the store open to the general public, petitioner had no legitimate expectation of privacy against governmental intrusion and warrantless search. Merely because a retail store invites the public to enter, it does not consent to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. The actions involved cannot be sustained on the ground that petitioner's clerk consented to the sweeping search. After the clerk was under arrest and aware of the presumed authority of the search warrant, his conduct complying with official requests cannot, on this record, be considered voluntary. Pp. 328–329.

Reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Bernard A. Berkman argued the cause and filed briefs for petitioner.

Richard L. Parker argued the cause for respondent. With him on the brief was *David S. Ritter*.*

**Michael A. Bamberger* filed a brief for the American Booksellers Association, Inc., et al. as *amici curiae* urging reversal.

Charles H. Keating, Jr., pro se, Richard M. Bertsch, and *James J.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari on claims that the seizure of magazines, films, and other objects from petitioner's bookstore violated guarantees of the First, Fourth, and Fourteenth Amendments. 439 U. S. 978 (1978).

I

On June 20, 1976, an investigator for the New York State Police purchased two reels of film from petitioner's so-called "adult" bookstore. Upon viewing them, he concluded the films violated New York's obscenity laws. On June 25, he took them to a Town Justice for a determination whether there was reasonable cause to believe the films violated the state obscenity laws so as to justify a warrant to search the seller's store. The Town Justice viewed both films in their entirety, and he apparently concluded they were obscene. Based upon an affidavit of the investigator subscribed before the Town Justice after this viewing, a warrant issued authorizing the search of petitioner's store and the seizure of other copies of the two films exhibited to the Town Justice.

The investigator's affidavit also contained an assertion that "similar" films and printed matter portraying similar activities could be found on the premises, and a statement of the affiant's belief that the items were possessed in violation of the obscenity laws. The warrant application requested that the Town Justice accompany the investigator to petitioner's store for the execution of the search warrant. The stated purpose was to allow the Town Justice to determine independently if any other items at the store were possessed in violation of law and subject to seizure. The Town Justice agreed. Accordingly, the warrant also contained a recital that authorized the seizure of "[t]he following items that the Court

Clancy filed a brief for Charles H. Keating, Jr., as *amicus curiae* urging affirmance.

independently [on examination] has determined to be possessed in violation of Article 235 of the Penal Law . . . ." [1] However, at the time the Town Justice signed the warrant there were no items listed or described following this statement. As noted earlier, the only "things to be seized" that were described in the warrant were copies of the two films the state investigator had purchased. Before going to the store, the Town Justice also signed a warrant for the arrest of the clerk who operated the store for having sold the two films to the investigator.

The Town Justice and the investigator enlisted three other State Police investigators, three uniformed State Police officers, and three members of the local prosecutor's office—a total of 11—and the search party converged on the bookstore. The store clerk was immediately placed under arrest and advised of the search warrant. He was the only employee present; he was free to continue working in the store to the extent the search permitted, and the store remained open to the public while the party conducted its search mission which was to last nearly six hours.

The search began in an area of the store which contained booths in which silent films were shown by coin-operated projectors. The clerk adjusted the machines so that the films could be viewed by the Town Justice without coins; it is disputed whether he volunteered or did so under compulsion of the arrest or the warrant. See *infra*, at 329. The Town Justice viewed 23 films for two to three minutes each and, satisfied there was probable cause to believe they were obscene, then ordered the films and the projectors seized.

The Town Justice next focused on another area containing four coin-operated projectors showing both soundless and sound films. After viewing each film for two to five minutes,

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[1] New York Penal Law § 235.00 (McKinney Supp. 1978–1979) is the definitional section of the State's obscenity law. Petitioner was later charged with obscenity in the second degree, § 235.05. See n. 3, *infra*.

again without paying, he ordered them seized along with their projectors.

The search party then moved to an area in which books and magazines were on display. The magazines were encased in clear plastic or cellophane wrappers which the Town Justice had two police officers remove prior to his examination of the books. Choosing only magazines that did not contain significant amounts of written material, he spent not less than 10 seconds nor more than a minute looking through each one. When he was satisfied that probable cause existed, he immediately ordered the copy which he had reviewed, along with other copies of the same or "similar" magazines, seized. An investigator wrote down the titles of the items seized. All told, 397 magazines were taken.

The final area searched was one in which petitioner displayed films and other items for sale behind a glass enclosed case. When it was announced that each box of film would be opened, the clerk advised that a picture on the outside of the box was representative of what the film showed. Therefore, if satisfied from the picture that there was probable cause to believe the film in the box was obscene, the Town Justice ordered the seizure of all copies of that film. As with the magazines, an investigator wrote down the titles of the films seized, a total of 431 reels.[2] Miscellaneous other items, including business records, were also seized, but no issue concerning them is raised here.

Throughout the day, two or three marked police cars were parked in front of the store and persons who entered the store were asked to show identification and their names were taken by the police. Not surprisingly, no sales were made during the period the search party was at the store, and no customers or potential customers remained in the store for any appreciable time after becoming aware of the police presence.

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[2] The State's brief asserts approximately 474 films were taken, but from the inventory filed in the case it appears the number was 431.

After the search and seizure was completed, the seized items were taken to a State Police barracks where they were inventoried. Each item was then listed on the search warrant, and late the same night the completed warrant was given to the Town Justice. The warrant, which had consisted of 2 pages when he signed it before the search, by late in the day contained 16 pages. It is clear, therefore, that the particular description of "things to be seized" was entered in the document after the seizure and impoundment of the books and other articles.

The items seized formed the basis for a three-count information charging petitioner with obscenity in the second degree under New York law.[3] The counts were based upon the three main groups of items seized: the magazines, Count I; the films for sale to the public, Count II; and the films and coin-operated projectors, Count III. Before trial, petitioner moved to suppress all the evidence upon which the three counts were based because it had been searched for and seized in violation of the First, Fourth, and Fourteenth Amendments. The motion was denied. Petitioner then entered a guilty plea to all three counts and was fined $1,000 on each. Accordingly, the obscenity of the magazines and films having been the subject of a judicial confession, there is no issue of obscenity in the case.[4] Only the validity of the warrant and the search and seizure of the property are before us.

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[3] New York Penal Law § 235.05 (McKinney Supp. 1978–1979) defines obscenity in the second degree as follows:

"A person is guilty of obscenity in the second degree when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material . . . ."

Section 235.00 of the Penal Law states:

"4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

[4] The clerk arrested at petitioner's store entered a guilty plea to a

New York permits appeal of a denial of a motion to suppress even after a plea of guilty to the charge. N. Y. Crim. Proc. Law § 710.70 (2) (McKinney 1971). Pursuant to this procedure, petitioner appealed and the intermediate appellate court for that judicial district affirmed the convictions. A timely application for leave to appeal to the New York Court of Appeals was denied.

II

This search warrant and what followed the entry on petitioner's premises are reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect. See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 311 (1978); *Stanford* v. *Texas*, 379 U. S. 476, 481 (1965); *Marcus* v. *Search Warrant*, 367 U. S. 717, 724 (1961). Except for the specification of copies of the two films previously purchased, the warrant did not purport to "particularly describ[e] . . . the . . . things to be seized." U. S. Const., Amdt. 4. Based on the conclusory statement of the police investigator that other similarly obscene materials would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. *Roaden* v. *Kentucky*, 413 U. S. 496, 502 (1973); *Stanford* v. *Texas*, *supra*, at 485; *Marcus* v. *Search Warrant*, *supra*, at 732. Nor does the Fourth Amendment countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out.

This search began when the local justice and his party entered the premises. But at that time there was not sufficient probable cause to pursue a search beyond looking for additional copies of the two specified films, assuming the validity of searching even for those. And the record is clear

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charge of disorderly conduct for selling the two films to the State Police investigator. He did not appeal.

that the search began and progressed pursuant to the sweeping open-ended authorization in the warrant. It was not limited at the outset as a search for other copies of the two "sample" films; it expanded into a more extensive search because other items were found that the local justice deemed illegal. Therefore, we have no occasion to decide whether in this context the "plain view" doctrine might be applicable. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 465 (1971).[5] Nor can it reasonably be argued that the search was incident to arrest of the store clerk. *Chimel* v. *California*, 395 U. S. 752 (1969).

III

We have repeatedly said that a warrant authorized by a neutral and detached judicial officer is "a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U. S. 10, 14 (1948)." *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977). See also *Coolidge* v. *New Hampshire*, *supra*, at 450. The State contends that the presence and participation of the Town Justice in the search ensured that no items would be seized absent probable cause to believe they were obscene, and that his presence enabled petitioner to enjoy an immediate adversary hearing on the issue.

The Town Justice did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure. *Coolidge* v. *New Hampshire*, *supra*, at 449. We need not question the

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[5] Of course, contraband may be seized without a warrant under the "plain view" doctrine. See, *e. g.*, *Ker* v. *California*, 374 U. S. 23, 42–43 (1963). But we have recognized special constraints upon searches for and seizures of material arguably protected by the First Amendment, *e. g.*, *Heller* v. *New York*, 413 U. S. 483 (1973); *Marcus* v. *Search Warrant*, 367 U. S. 717, 731–732 (1961); materials normally may not be seized on the basis of alleged obscenity without a warrant.

subjective belief of the Town Justice in the propriety of his actions, but the objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset. He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. Once in the store, he conducted a generalized search under authority of an invalid warrant; he was not acting as a judicial officer but as an adjunct law enforcement officer. When he ordered an item seized because he believed it was obscene, he instructed the police officers to seize all "similar" items as well, leaving determination of what was "similar" to the officer's discretion. Indeed, he yielded to the State Police even the completion of the general provision of the warrant. Though it would not have validated the warrant in any event, the Town Justice admitted at the hearing to suppress evidence that he could not verify that the inventory prepared by the police and presented to him late that evening accurately reflected what he had ordered seized.

We also cannot accept the State's contention that it acted in compliance with *Heller* v. *New York*, 413 U. S. 483 (1973). There, based on police reports of probable violation of state law, a judge viewed a film in a theater as an ordinary paying patron; on the basis of his observation of the entire performance, he then issued a warrant for the seizure of the particular viewed film as evidence. There was no claim that seizure of the single copy impeded the exhibitor's continued business pending decision on the issue of obscenity. Heller's claim was that not even one of his films could be lawfully seized without a prior adversary hearing. We rejected that claim and held that seizure on the warrant so issued by a neutral judicial officer on probable cause after viewing one film was constitutionally permissible so long as, on request, a prompt adversary hearing was available on the issue of obscenity. "With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure [of a single sample film] by lawful

warrant would materially increase First Amendment protection." *Id.*, at 493. We also took pains to point out:

> "Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of *A Quantity of Books* [v. *Kansas*, 378 U. S. 205 (1964),] and *Marcus* [v. *Search Warrant*, 367 U. S. 717 (1961),] are fully met. . . .
>
> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." *Id.*, at 491–492.

In contrast, the local justice here undertook to telescope the processes of the application for a warrant, the issuance of the warrant, and its execution. It is difficult to discern when he was acting as a "neutral and detached" judicial officer and when he was one with the police and prosecutors in the executive seizure, and indeed even whether he thought he was conducting, *ex parte*, the "prompt" postseizure hearings on obscenity called for by *Heller*, *supra*, at 492. *Heller* does not permit the kind of activities revealed by this record.[6]

IV

Perhaps anticipating our disposition of the case, the State

[6] We do not suggest, of course, that a "neutral and detached magistrate," *Shadwick* v. *Tampa*, 407 U. S. 345, 350 (1972), loses his character as such merely because he leaves his regular office in order to make himself readily available to law enforcement officers who may wish to seek the issuance of warants by him. For example, in *Heller*, the judge signed the search warrant for the seizure of the film in the theater itself. But as we have just pointed out, *Heller* cannot control this case where the local Town Justice undertook not merely to issue a warrant, but to participate with the police and prosecutors in its execution.

raises a different theory from the one advanced in its opposition to the petition for certiorari and on which it had relied in the state courts. The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, see *Rakas* v. *Illinois,* 439 U. S. 128 (1978), and that accordingly no warrant was needed. But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. See *Lewis* v. *United States,* 385 U. S. 206, 211 (1966). The Town Justice viewed the films, not as a customer, but without the payment a member of the public would be required to make. Similarly, in examining the books and in the manner of viewing the containers in which the films were packaged for sale, he was not seeing them as a customer would ordinarily see them.

Any suggestion that petitioner through its clerk consented to the sweeping search also comes too late. After Lo-Ji's agent was placed under arrest and was aware of the presumed authority of the search warrant, his conduct complying with official requests cannot, on this record, be considered free and voluntary. Any "consent" given in the face of "colorably lawful coercion" cannot validate the illegal acts shown here. *Bumper* v. *North Carolina,* 391 U. S. 543, 549–550 (1968). Our society is better able to tolerate the admittedly pornographic business of petitioner than a return to the general warrant era; violations of law must be dealt with within the framework of constitutional guarantees.

The judgment of the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

REITER *v.* SONOTONE CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78-690. Argued April 25, 1979—Decided June 11, 1979

Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by respondents, alleging that, because of antitrust violations committed by respondents, she and the class she seeks to represent have been forced to pay illegally fixed higher prices for the hearing aids and related services they purchased from respondents' retail dealers. Treble damages were sought under § 4 of the Clayton Act, which provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring suit and recover treble damages. Respondents moved to dismiss the damages claim on the ground that petitioner had not been injured in her "business or property" within the meaning of § 4. The District Court held that under § 4 a retail purchaser is injured in "property" if it can be shown that antitrust violations caused an increase in the price paid for the article purchased; however, it certified the question to the Court of Appeals. The Court of Appeals reversed, holding that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" within the meaning of § 4, and that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures.

Held: Consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "property" within the meaning of § 4. Pp. 337–345.

(a) Statutory construction must begin with the language employed by Congress. The word "property" has a naturally broad and inclusive meaning comprehending, in common usage, anything of material value owned or possessed. Congress' use of the disjunctive "or" in the phrase "business or property" indicates "business" was not intended to modify "property," nor was "property" intended to modify "business." Giving the word "property" the independent significance to which it is entitled in this context does not destroy the restrictive significance of the phrase "business or property" as a whole. Pp. 337–339.

(b) Monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4. *Chattanooga Foundry & Pipe Works*

v. *Atlanta*, 203 U. S. 390. Thus, the fact that petitioner was deprived of only money is no reason to conclude that she did not sustain a "property" injury. Pp. 339–340.

(c) Nor does petitioner's status as a "consumer" who purchased goods at retail for personal use change the nature of the injury she suffered or the intrinsic meaning of "property" in § 4. Pp. 340–342.

(d) The legislative history reflects that the treble-damages remedy was designed to protect consumers, and that no one questioned the right of consumers to sue under § 4. Thus, to the extent that § 4's legislative history is relevant, it also supports the conclusion that a consumer deprived of money by reason of anticompetitive conduct is injured in "property" within the meaning of § 4. Pp. 342–344.

(e) The fact that allowing class actions such as this may add a significant burden to the federal courts' already overcrowded dockets is an important but not a controlling consideration, since Congress created the § 4 treble-damages remedy precisely for the purpose of encouraging *private* challenges to antitrust violations. P. 344.

(f) Respondents' arguments that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers, are policy considerations more properly addressed to Congress than to this Court; in any event they cannot govern the reading of the plain language of § 4. Pp. 344–345.

579 F. 2d 1077, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the decision of the case. REHNQUIST, J., filed a concurring opinion, *post*, p. 345.

John E. Thomas argued the cause and filed a brief for petitioner.

Julian R. Wilheim and *Elliot S. Kaplan* argued the cause for respondents. With them on the brief were *Fred L. Woodworth, Joseph C. Basta,* and *Deborah J. Palmer.*

Assistant Attorney General Shenefield argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Deputy Solicitor General Easterbrook, Stephen M. Shapiro, Barry Grossman,* and *Bruce E. Fein. Warren Spannaus,* Attorney Gen-

eral of Minnesota, argued the cause for the States of Alabama et al. as *amici curiae* urging reversal. With him on the brief were *Richard B. Allyn*, Solicitor General of Minnesota, *Alan H. Maclin*, *Stephen P. Kilgruff*, and *Thomas Kenyon*, Special Assistant Attorneys General; and *John Ashcroft*, Attorney General of Missouri, *Walter O. Theiss*, Assistant Attorney General, and *Roger Bern;* joined by other officials for their respective States as follows: *Charles A. Graddick*, Attorney General, for Alabama; *Avrum M. Gross*, Attorney General, and *Mark E. Ashburn*, Assistant Attorney General, for Alaska; *Robert K. Corbin*, Attorney General, and *Kenneth R. Reed* for Arizona; *Steve Clark*, Attorney General, and *Royce O. Griffin, Jr.*, Deputy Attorney General, for Arkansas; *George Deukmejian*, Attorney General, *Warren J. Abbott*, Assistant Attorney General, and *Linda L. Tedeschi*, Deputy Attorney General, for California; *J. D. MacFarlane*, Attorney General, *B. Lawrence Theis*, First Assistant Attorney General, and *William E. Walters*, Assistant Attorney General, for Colorado; *Carl R. Ajello*, Attorney General, *Gerard J. Dowling* and *Larry H. Evans*, Assistant Attorneys General, for Connecticut; *Richard S. Gebelein*, Attorney General, and *William E. Kirk III*, Assistant Attorney General, for Delaware; *Jim Smith*, Attorney General, *Charles R. Ranson*, Special Assistant Attorney General, and *Douglas C. Kearney*, Assistant Attorney General, for Florida; *Wayne Minami*, Attorney General, and *Thomas T. Wood*, Deputy Attorney General, for Hawaii; *David H. Leroy*, Attorney General, and *Mike Brassey*, Deputy Attorney General, for Idaho; *William J. Scott*, Attorney General, for Illinois; *Theodore L. Sendak*, Attorney General, for Indiana; *Thomas J. Miller*, Attorney General, and *Gary H. Swanson*, Assistant Attorney General, for Iowa; *Robert T. Stephan*, Attorney General, and *Wayne E. Hundley*, Deputy Attorney General, for Kansas; *Robert F. Stephens*, Attorney General, and *James M. Ringo*, Assistant

Attorney General, for Kentucky; *William J. Guste, Jr.*, Attorney General, and *John R. Flowers, Jr.*, Assistant Attorney General, for Louisiana; *Richard S. Cohen*, Attorney General, and *Cheryl Harrington*, Assistant Attorney General, for Maine; *Stephen H. Sachs*, Attorney General, and *Charles O. Monk II*, Assistant Attorney General, for Maryland; *Francis X. Bellotti*, Attorney General, *Paula W. Gold*, Assistant Attorney General, and *Steven J. Greenfogel* for Massachusetts; *Frank J. Kelley*, Attorney General, and *Edwin M. Bladen*, Assistant Attorney General, for Michigan; *A. F. Summer*, Attorney General, and *Marshall G. Bennett*, Assistant Attorney General, for Mississippi; *Mike T. Greely*, Attorney General, and *Jerome J. Cate*, Assistant Attorney General, for Montana; *Paul L. Douglas*, Attorney General, and *Robert F. Bartle* and *Paul E. Hofmeister*, Assistant Attorneys General, for Nebraska; *Richard H. Bryan*, Attorney General, for Nevada; *Thomas D. Rath*, Attorney General, for New Hampshire; *John J. Degnan*, Attorney General, and *Alfred J. Luciani* for New Jersey; *Jeff Bingham*, Attorney General, and *James J. Wechsler*, Assistant Attorney General, for New Mexico; *Robert Abrams*, Attorney General, and *John M. Desiderio*, Assistant Attorney General, for New York; *Rufus L. Edmisten*, Attorney General, *Howard A. Kramer*, Deputy Attorney General, and *David S. Crump*, Special Deputy Attorney General, for North Carolina; *Allen I. Olson*, Attorney General, and *Dale V. Sandstrom* and *Terry L. Adkins*, Assistant Attorneys General, for North Dakota; *William J. Brown*, Attorney General, and *Eugene F. McShane* and *Richard M. Firestone*, Assistant Attorneys General, for Ohio; *Jan Eric Cartwright*, Attorney General, and *Manville J. Buford*, Assistant Attorney General, for Oklahoma; *James A. Redden*, Attorney General, and *James Kirkham Johns* for Oregon; *Edward G. Biester, Jr.*, Attorney General, and *Norman J. Watkins* and *John L. Shearburn*, Deputy Attorneys General,

for Pennsylvania; *Dennis J. Roberts II*, Attorney General, and *Patrick J. Quinlan*, Special Assistant Attorney General, for Rhode Island; *Daniel R. McLeod*, Attorney General, for South Carolina; *Mark V. Meierhenry*, Attorney General, and *James E. McMahon*, Assistant Attorney General, for South Dakota; *William M. Leech, Jr.*, Attorney General, and *William J. Haynes, Jr.*, Deputy Attorney General, for Tennessee; *Mark White*, Attorney General, for Texas; *Robert B. Hansen*, Attorney General, and *Andrew W. Buffmire*, Assistant Attorney General, for Utah; *M. Jerome Diamond*, Attorney General, and *Jay I. Ashman*, Assistant Attorney General, for Vermont; *Marshall Coleman*, Attorney General, and *Joseph W. Kaestner*, Assistant Attorney General, for Virginia; *Slade Gorton*, Attorney General, *Thomas L. Boeder*, Senior Assistant Attorney General, and *Earle J. Hereford, Jr.*, Assistant Attorney General, for Washington; *Chauncey H. Browning, Jr.*, Attorney General, and *Charles G. Brown*, Deputy Attorney General, for West Virginia; *Bronson C. La Follette*, Attorney General, and *Michael L. Zaleski*, Assistant Attorney General, for Wisconsin; and *John D. Troughton*, Attorney General, *Peter J. Mulvaney*, Deputy Attorney General, and *James W. Gusea*, Assistant Attorney General, for Wyoming.*

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to decide whether consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "business or property" within the meaning of § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15.

**David Berger, H. Laddie Montague, Jr., Merrill G. Davidoff, Stanley J. Friedman, Frederick P. Furth, Thomas R. Fahrner, Aaron M. Fine,* and *Josef D. Cooper* filed a brief for the plaintiffs in *Kennedy Smith* v. *Toyota Motor Sales U. S. A. et al.* as *amici curiae* urging reversal.

I

Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by five corporations, respondents here. Her complaint alleges that respondents have committed a variety of antitrust violations, including vertical and horizontal price fixing.[1] Because of these violations, the complaint alleges, petitioner and the class of persons she seeks to represent have been forced to pay illegally fixed higher prices for the hearing aids and related services they purchased from respondents' retail dealers. Treble damages and injunctive relief are sought under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, as amended, 15 U. S. C. §§ 15 and 26.

Respondents moved for dismissal of the complaint or summary judgment in the District Court. Among other things, respondents argued that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for treble damages under § 4 of the Clayton Act because she had not been injured in her "business or property" within the meaning of the Act.

The District Court held that under § 4 a retail purchaser is injured in "property" if the purchaser can show that antitrust violations caused an increase in the price paid for the article purchased. The District Court relied on *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 396 (1906), and the legislative history of the Clayton Act set forth in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477,

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[1] Specifically, Reiter alleges that respondents violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2, and § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14. She claims respondents restricted the territories, customers, and brands of hearing aids offered by their retail dealers, used the customer lists of their retail dealers for their own purposes, prohibited unauthorized retailers from dealing in or repairing their hearing aids, and conspired among themselves and with their retail dealers to fix the retail prices of the hearing aids.

486 n. 10 (1977), indicating that Congress intended to give a § 4 remedy to consumers. 435 F. Supp. 933, 935–938 (Minn. 1977).

The District Court determined, however, that the respondents had raised a "controlling question of law as to which there is substantial ground for difference of opinion," *id.*, at 938, and accordingly certified the question for interlocutory review under 28 U. S. C. § 1292 (b). It then stayed further proceedings in the case and declined to express any opinion on the merits of the other issues raised by respondents' motions or on the certifiability of the class.

The Court of Appeals reversed, holding that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" within the meaning of § 4. 579 F. 2d 1077 (CA8 1978). Noting the absence of any holdings on this precise issue by this Court or other courts of appeals, the court reasoned that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures. It relied on the legislative history and this Court's statement in *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 264 (1972), that "business or property" referred to "commercial interests or enterprises." A contrary holding, the Court of Appeals observed, would add a substantial volume of litigation to the already strained dockets of the federal courts and could be used to exact unfair settlements from retail businesses. Small and medium-sized retailers would be especially hard hit by "gigantic consumer class actions," and granting standing to retail consumers might actually have an anticompetitive impact as a consequence. Accordingly, the Court of Appeals thought "it sensible as a matter of policy and compelled as a matter of law that consumers alleging no injury of a commercial or competitive nature are not injured in their property under section 4 of the Clayton Act." 579 F. 2d, at 1087.

We granted certiorari, 439 U. S. 1065 (1979).[2] We reverse.[3]

II

As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress. Section 4 of the Clayton Act, 38 Stat. 731, provides:

> "*Any person* who shall be injured in his business *or property* by reason of *anything* forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15 (emphasis added).

On its face, § 4 contains little in the way of restrictive language. In *Pfizer Inc.* v. *Government of India*, 434 U. S. 308 (1978), we remarked:

> " 'The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden prac-

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[2] Differing views on this issue have been expressed by various courts. See, *e. g.*, *Reiter* v. *Sonotone Corp.*, 579 F. 2d 1077 (CA8 1978) (case below); *Bravman* v. *Bassett Furniture Industries*, 552 F. 2d 90, 98–99, and n. 23 (CA3), cert. denied, 434 U. S. 823 (1977); *Cleary* v. *Chalk*, 159 U. S. App. D. C. 415, 419 n. 17, 488 F. 2d 1315, 1319 n. 17 (1973), cert. denied, 416 U. S. 938 (1974); *Theophil* v. *Sheller-Globe Corp.*, 446 F. Supp. 131 (EDNY 1978); *Gutierrez* v. *E. & J. Gallo Winery Co.*, 425 F. Supp. 1221 (ND Cal. 1977), appeal docketed, No. 77–1725 (CA9).

[3] The Court of Appeals expressly noted that Reiter's claim for injunctive relief under § 16 of the Clayton Act was not before it on interlocutory appeal. 579 F. 2d, at 1087 n. 19. The court therefore expressed no view as to Reiter's standing to raise this claim. It also expressly refused to decide whether Reiter's claim for treble damages under § 4 was barred by the direct-purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977). 579 F. 2d, at 1079 n. 3. Accordingly, these issues are not before us.

> tices by whomever they may be perpetrated.' *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236; cf. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 138–139. And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition." *Id.*, at 312.

Similarly here, the word "property" has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage "property" comprehends anything of material value owned or possessed. See, *e. g.*, Webster's Third New International Dictionary 1818 (1961). Money, of course, is a form of property.

Respondents protest that, if the reference to "property" in § 4 means "money," the term "business" then becomes superfluous, for every injury in one's business necessarily involves a pecuniary injury. They argue that if Congress wished to permit one who lost only money to bring suit under § 4, it would not have used the restrictive phrase "business or property"; rather, it would have employed more generic language akin to that of § 16, for example, which provides for injunctive relief against any "threatened loss or damage." 15 U. S. C. § 26. Congress plainly intended to exclude *some* category of injury in choosing the phrase "business or property" for § 4. Only a "commercial interest" gloss, they argue, both gives the phrase the restrictive significance intended for it and at the same time gives independent significance to the word "business" and the word "property." The argument of respondents is straightforward: the phrase "business or property" means "business activity or property related to one's business." Brief for Respondents 11 n. 7.

That strained construction would have us ignore the disjunctive "or" and rob the term "property" of its independent

and ordinary significance; moreover, it would convert the noun "business" into an adjective. In construing a statute we are obliged to give effect, if possible, to every word Congress used. *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955). Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 739–740 (1978). Congress' use of the word "or" makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business."

When a commercial enterprise suffers a loss of money it suffers an injury in both its "business" and its "property." But neither term is rendered redundant by recognizing that a consumer not engaged in a "business" enterprise, but rather acquiring goods or services for personal use, is injured in "property" when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of. The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered. *E. g.*, *Hamman* v. *United States*, 267 F. Supp. 420, 432 (Mont. 1967). Congress must have intended to exclude some class of injuries by the phrase "business or property." But it taxes the ordinary meaning of common terms to argue, as respondents do, that a consumer's monetary injury arising directly out of a retail purchase is not comprehended by the natural and usual meaning of the phrase "business or property." We simply give the word "property" the independent significance to which it is entitled in this context. A consumer whose money has been diminished by reason of an antitrust violation has been injured "in his . . . property" within the meaning of § 4.

Indeed, this Court indicated as much in *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390 (1960). There the city alleged that the anticompetitive conduct of the de-

fendants had caused the city to pay more for water pipes purchased for use in the city's water system. The defendants answered that the pecuniary injury resulting from the alleged overcharges did not injure the city in its "business or property" within the meaning of § 4. This Court, without relying on the fact that the city was engaged in a business enterprise, stated:

> "The city was . . . injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." 203 U. S., at 396.

The holding of *Chattanooga Foundry* could well have been grounded on the undisputed fact that the city was engaged in the commercial enterprise of supplying water for a charge and, therefore, engaged in a business. It was not uncommon for both municipalities and private companies to own and operate competing waterworks at the turn of the century. In operating a municipal public utility, the city was in a real sense engaged in the "business of furnishing water" when it purchased the pipe to carry water from the city's reservoirs to its customers. *Ibid.*

Yet, the Court's holding in *Chattanooga Foundry* was deliberately grounded on the premise that the city had been injured in its "property"—independent of any injury it had sustained in its "business of furnishing water"—because the defendants' antitrust violation caused it to pay a higher price for the pipe than it otherwise would have paid. *Ibid.* *Chattanooga Foundry* therefore establishes that monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4. Thus, the fact that petitioner Reiter was deprived of only money, albeit a modest amount, is no reason to conclude that she did not sustain a "property" injury.

Nor does her status as a "consumer" change the nature of

the injury she suffered or the intrinsic meaning of "property" in § 4. That consumers of retail goods and services have standing to sue under § 4 is implicit in our decision in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 780, 782 (1975). There we held that a bar association was subject to a treble-damages suit brought under § 4 by persons who sought legal services in connection with the purchase of a residence. Furthermore, we have often referred to "consumers" as parties entitled to seek damages under § 4 without intimating that consumers of goods and services purchased for personal rather than commercial use were in any way foreclosed by the statutory language from asserting an injury in their "property." *E. g., Pfizer Inc.* v. *Government of India,* 434 U. S., at 313–315; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S., at 486 n. 10; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481, 494 (1968); *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, 236 (1948).

Hawaii v. *Standard Oil Co.,* 405 U. S. 251 (1972), is not to the contrary. There we held that injury to a state's total economy, for which the state sought redress in its *parens patriae* capacity, was not cognizable under § 4. It is true we noted that the words "business or property" refer to "commercial interests or enterprises," and reasoned that Hawaii could not recover on its claim for damage done to its "general economy" because such injury did not harm Hawaii's "commercial interests." 405 U. S., at 264.

However, the language of an opinion is not always to be parsed as though we were dealing with language of a statute. Use of the phrase "commercial interests or enterprises," read in context, in no sense suggests that only injuries to a business entity are within the ambit of § 4. Respondents ignore the Court's careful use of the disjunctive and the naturally broad meaning of the term "interests" in *Hawaii* v. *Standard Oil Co., supra.* The phrase "commercial interests" was used there as a generic reference to the interests of the

State of Hawaii as a party to a commercial transaction. This is apparent from *Hawaii*'s explicit reaffirmance of the rule of *Chattanooga Foundry* and statement that, where injury to a state "occurs in its capacity as a consumer in the marketplace" through a "payment of money wrongfully induced," treble damages are recoverable by a state under the Clayton Act. *Hawaii* v. *Standard Oil Co., supra,* at 263 n. 14. A central premise of our holding in *Hawaii* was concern over duplicative recoveries. We noted that a "large and ultimately indeterminable part of the injury to the 'general economy' " for which the State sued was "no more than a reflection of injuries to the 'business or property' of consumers" for which, on a proper showing, they could recover in their own right. 405 U. S., at 263–264.

Consumers in the United States purchase at retail more than $1.2 trillion in goods and services annually. 1978 Economic Report of the President 257 (Table B–1). It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market. Here, where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her "property" under § 4.

Nothing in the legislative history of § 4 conflicts with our holding today. Many courts and commentators have observed that the respective legislative histories of § 4 of the Clayton Act and § 7 of the Sherman Act, its predecessor, shed no light on Congress' original understanding of the terms "business or property." [4] Nowhere in the legislative record

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[4] See, *e. g., Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 261 (1972); *Weinberg* v. *Federated Department Stores, Inc.*, 426 F. Supp. 880, 882–883 (ND Cal. 1977), appeal docketed, No. 77–1547 (CA9); M. Forkosch,

is specific reference made to the intended scope of those terms. Respondents engage in speculation in arguing that the substitution of the terms "business or property" for the broader language originally proposed by Senator Sherman [5] was clearly intended to exclude pecuniary injuries suffered by those who purchase goods and services at retail for personal use. None of the subsequent floor debates reflect any such intent. On the contrary, they suggest that Congress designed the Sherman Act as a "consumer welfare prescription." R. Bork, The Antitrust Paradox 66 (1978). Certainly the leading proponents of the legislation perceived the treble-damages remedy of what is now § 4 as a means of protecting consumers from overcharges resulting from price fixing. *E. g.*, 21 Cong. Rec. 2457, 2460, 2558 (1890). Because Congress in 1890 rejected a proposal to allow a group of consumers to bring a collective action as a class, some legislators questioned whether individual consumers would be willing to bring actions for relatively small amounts. See, *e. g.*, *id.*, at 1767–1768, 2569, 2612, 3147–3148, 3150. At no time, however, was the *right* of a consumer to bring an action for damages questioned.[6]

In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, after examining the legislative history of § 4, we described the Sherman Act as "conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as 'open[ing] the door of justice

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Antitrust and the Consumer 2–3 (1956); Comment, Closing the Door on Consumer Antitrust Standing, 54 N. Y. U. L. Rev. 237, 242–243, 249–252 (1979). See also 1 P. Areeda & D. Turner, Antitrust Law ¶ 106, pp. 14–16 (1978).

[5] As originally introduced, the bill that ultimately became the Sherman Act authorized "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination" to sue for damages thereby sustained. S. 1, 51st Cong., 1st Sess., § 2 (1889).

[6] Of course, the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23.

to every man . . . and giv[ing] the injured party ample damages for the wrong suffered.' " 429 U. S., at 486 n. 10. Thus, to the extent that the legislative history is relevant, it supports our holding that a consumer deprived of money by reason of allegedly anticompetitive conduct is injured in "property" within the meaning of § 4.[7]

Respondents also argue that allowing class actions to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. We must take the statute as we find it. Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. Indeed, nearly 20 times as many private antitrust actions are currently pending in the federal courts as actions filed by the Department of Justice. Administrative Office of the United States Courts Ann. Rep. 101, Table 28 (1978). To be sure, these private suits impose a heavy litigation burden on the federal courts; it is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandates.

Finally, respondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by

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[7] Although in no sense a controlling consideration, we note that our holding is consistent with the assumption on which Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, 15 U. S. C. § 15c *et seq.* The text and legislative history of this statute make clear that in 1976 Congress believed that consumers have a cause of action under § 4, which the statute authorizes the states to assert in a *parens patriae* capacity. See, *e. g.*, 15 U. S. C. §§ 15c (a)(1), 15c (a)(1)(B)(ii), 15c (b)(2); H. R. Rep. No. 94–499, pp. 6, 9 (1975). See also *Illinois Brick Co.* v. *Illinois*, 431 U. S., at 734 n. 14.

consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court. However accurate respondents' arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in § 4.

District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions. See generally Durham & Dibble, Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation, 1978 B. Y. U. L. Rev. 299. Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class-action harassment, or "windfall" settlements if the district courts exercise sound discretion and use the tools available.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN took no part in the decision of this case.

MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion and write separately only to point out that the concern expressed by the Court of Appeals that an interpretation of "business or property" in the manner in which the Court interprets it today would "add a substantial volume of litigation to the already strained dockets of the federal courts and could be used to exact unfair settlements from retail businesses," *ante*, at 336, is by no means an unfounded one. And pronouncements from this Court exhorting district courts to be "especially alert to identify frivolous

claims brought to extort nuisance settlements" will not be a complete solution for those courts which are actually on the firing line in this type of litigation. *Ante*, at 345. But I fully agree that we must take the statute as Congress wrote it, and I also fully agree with the Court's construction of the phrase "business or property." I think that the Court's observation, *ante*, at 343 n. 6, that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23" is a miracle of understatement; and in the absence of any jurisdictional limit, there is considerable doubt in my mind whether this type of action is indeed ultimately of primary benefit to consumers themselves, who may recover virtually no monetary damages, as opposed to the attorneys for the class, who stand to obtain handsome rewards for their services. Be that as it may, the problem, if there is one, is for Congress and not for the courts.

Syllabus

ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* SIERRA CLUB ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-625. Argued April 18, 1979—Decided June 11, 1979

Section 102 (2)(C) of the National Environmental Policy Act of 1969 (NEPA) requires environmental impact statements (EIS's) to be included in recommendations or reports of federal agencies on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Contending that § 102 (2)(C) requires federal agencies to prepare EIS's to accompany appropriation requests, respondents, three organizations with interests in the preservation of the environment, brought suit in Federal District Court against petitioners, the Secretary of the Interior and the Director of the Office of Management and Budget (OMB). Respondents alleged that proposed curtailments in the budget of the National Wildlife Refuge System would significantly affect the quality of the human environment, and hence should have been accompanied by an EIS prepared both by the Department of the Interior's Fish and Wildlife Service, which administers the Refuge System, and by OMB. The District Court granted summary judgment for respondents and ordered petitioners to prepare EIS's on annual proposals for financing the Refuge System. The District Court's holding was modified by the Court of Appeals, which concluded that while § 102 (2)(C) has no application to a routine appropriation request for continuance of an ongoing program, an EIS is required when an appropriation request accompanies a proposal for taking new action that significantly changes the status quo, or when the request "ushers in a considered programmatic course following a programmatic review."

Held: Section 102 (2)(C) does not require federal agencies to prepare EIS's to accompany appropriation requests. Pp. 355-365.

(a) Appropriation requests, even those which are the result of an agency's "painstaking review" of an ongoing program, are not "proposals for legislation" within the meaning of § 102 (2)(C). NEPA makes no distinction between "proposals for legislation" that are the result of "painstaking review," and those that are merely "routine"; and the interpretation of NEPA by the Council on Environmental Quality (CEQ) under its current mandatory regulations which specify that "legislation" does not include appropriation requests, is entitled to

substantial deference even though the regulations reverse CEQ's interpretation under earlier advisory guidelines that were in effect at the time of the Court of Appeals' decision. Moreover, CEQ's current interpretation is consistent with the traditional distinction which Congress has drawn between "legislation" and "appropriation," the rules of both Houses prohibiting "legislation" from being added to an appropriation bill. Pp. 356–361.

(b) Nor do appropriation requests constitute "proposals for . . . major Federal actions" for purposes of § 102 (2)(C). Appropriation requests do not "propose" federal actions at all, but instead fund actions already proposed. Thus, § 102 (2)(C) is best interpreted as applying to those recommendations or reports that actually propose programmatic actions, rather than to those which merely suggest how such actions may be funded. Even if changes in agency programs occur *because* of budgetary decisions, an EIS at the appropriation stage would only be repetitive of the EIS that must accompany any proposed changes in the agency's programs that would significantly affect the quality of the human environment. Pp. 361–364.

189 U. S. App. D. C. 117, 581 F. 2d 895, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Assistant Attorney General Harmon argued the cause for petitioners. On the briefs were *Acting Solicitor General Wallace, Acting Assistant Attorney General Sagalkin, Deputy Solicitor General Barnett, Peter R. Steenland, Jr., Raymond N. Zagone,* and *Dirk D. Snel.*

James Hillson Cohen argued the cause and filed briefs for respondents.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether § 102 (2)(C) of the National Environmental Policy Act of 1969 (NEPA), 83 Stat.

**Ronald A. Zumbrun, Robert K. Best,* and *Raymond M. Momboisse* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Roberts B. Owen* and *Charles H. Montange* for the National Wildlife Federation et al.; and by *Mitchell Rogovin* and *David R. Boyd* for the Wilderness Society.

853, 42 U. S. C. § 4332 (2)(C), requires federal agencies to prepare environmental impact statements (EIS's) to accompany appropriation requests. We hold that it does not.

I

NEPA sets forth its purposes in bold strokes:

> "The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation . . . ." 83 Stat. 852, 42 U. S. C. § 4321.[1]

Congress recognized, however, that these desired goals could

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[1] Section 101 (b) articulates these purposes with even greater particularity:

"In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

"(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

"(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

"(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

"(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." 83 Stat. 852, 42 U. S. C. § 4331 (b).

be incorporated into the everyday functioning of the Federal Government only with great difficulty. See S. Rep. No. 91–296, p. 19 (1969). NEPA therefore contains "action-forcing procedures which will help to insure that the policies [of the Act] are implemented." *Ibid.* See *Kleppe* v. *Sierra Club*, 427 U. S. 390, 409 (1976). Section 102 (2)(C) of the Act sets out one of these procedures:

> "The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—
>
> . . . . .
>
> "(C) include in every recommendation or report *on proposals for legislation and other major Federal actions* significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 83 Stat. 853, 42 U. S. C. § 4332 (2)(C) (emphasis supplied).

The thrust of § 102 (2)(C) is thus that environmental concerns be integrated into the very process of agency decisionmaking. The "detailed statement" it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions.[2] If

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[2] Of course, an EIS need not be promulgated unless an agency's planning ripens into a "recommendation or report on proposals for legislation [or] other major Federal actions significantly affecting the quality of the human

environmental concerns are not interwoven into the fabric of agency planning, the "action-forcing" characteristics of § 102 (2)(C) would be lost. "In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning . . . . As a result, unless the results of planning are radically revised at the policy level—and this often means the Congress—environmental enhancement opportunities may be foregone and unnecessary degradation incurred." S. Rep. No. 91–296, *supra*, at 20. For this reason the regulations of the Council on Environmental Quality (CEQ) require federal agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values . . . ." 43 Fed. Reg. 55992 (1978) (to be codified at 40 CFR § 1501.2).[3]

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environment." 42 U. S. C. § 4332 (2)(C). See *Kleppe* v. *Sierra Club*, 427 U. S. 390 (1976). Moreover, although NEPA requires compliance "to the fullest extent possible," we have held that the duty to prepare an EIS must yield before "a clear and unavoidable conflict in statutory authority." *Flint Ridge Development Co.* v. *Scenic Rivers Assn.*, 426 U. S. 776, 788 (1976).

[3] CEQ regulations state that "[t]he primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government. . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 43 Fed. Reg. 55994 (1978) (to be codified at 40 CFR § 1502.1).

In Exec. Order No. 11991, President Carter required the CEQ to issue regulations that included procedures "for the early preparation of environmental impact statements." 3 CFR 124 (1978). As a consequence, CEQ regulations provide:

"An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it

In 1974, respondents, three organizations with interests in the preservation of the environment,[4] brought suit in the Federal District Court for the District of Columbia alleging that § 102 (2)(C) requires federal agencies to prepare EIS's[5] to accompany their appropriation requests. Respondents named as defendants the Secretary of the Interior and the Director of the Office of Mangement and Budget (OMB), and alleged that proposed curtailments in the budget of the National Wildlife Refuge System (NWRS), 80 Stat. 927, 16 U. S. C. § 668dd, would "cut back significantly the operations, maintenance, and staffing of units within the System."[6] Complaint ¶ 17. The System is administered by the Fish and Wildlife Service of the Department of the Interior, and consists of more than 350 refuges encompassing more than 30 million acres in 49 States. The primary purpose of the NWRS is to provide a national program "for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources." 50 CFR § 25.11 (b)

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can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made. . . . For instance:

"(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary. . . ." 43 Fed. Reg. 55995 (1978) (to be codified at 40 CFR § 1502.5).

[4] Respondents are the Sierra Club, the National Parks and Conservation Association, and the Natural Resources Defense Council, Inc.

[5] CEQ regulations define an "environmental impact statement" to mean "a detailed written statement as required by Sec. 102 (2)(C) of [NEPA]." 43 Fed. Reg. 56004 (1978) (to be codified at 40 CFR § 1508.11).

[6] See United States Fish and Wildlife Service, Final Environmental Statement: Operation of the National Wildlife Refuge System I–8 to I–9 (Nov. 1976).

(1978).[7] Respondents alleged that the proposed budget curtailments would significantly affect the quality of the human environment,[8] and hence should have been accompanied by an EIS prepared both by the Fish and Wildlife Service and by OMB.[9]

The District Court agreed with respondents' contentions. Relying on provisions of the then applicable CEQ guidelines,[10]

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[7] The System is administered according to the provisions of several statutes. The most significant of these are the Fish and Wildlife Coordination Act of 1934, 48 Stat. 401, as amended, 72 Stat. 563, 16 U. S. C. § 661 *et seq.*; the Fish and Wildlife Act of 1956, 70 Stat. 1119, 16 U. S. C. § 742a *et seq.*; the Migratory Bird Conservation Act, ch. 257, 45 Stat. 1222, as amended, 16 U. S. C. § 715 *et seq.*; and the Endangered Species Act of 1973, 87 Stat. 884, 16 U. S. C. § 1531 *et seq.*

[8] Respondents brought suit on behalf of themselves, claiming that they had organizational interests in monitoring and publicizing the management of the NWRS, and on behalf of their members, alleging that the latter used the NWRS for recreational and other purposes and would be affected by the proposed budget curtailments.

[9] Respondents alleged that OMB had "significantly reduced the Interior Department's request for appropriations for the operation of the National Wildlife Refuge System during fiscal year 1974 and during other years without preparing or considering the environmental-impact statement required by NEPA." Complaint ¶ 25.

Respondents also contended that § 102 (2)(B) of NEPA required OMB to develop procedures to assure consideration of environmental factors in the budget process. Section 102 (2)(B) requires all federal agencies to "identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 83 Stat. 853, 42 U. S. C. § 4332 (2)(B).

[10] At that time, CEQ was authorized by Exec. Order No. 11514, § 3 (h), to issue nonbinding "guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment." 3 CFR 904 (1966–1970 Comp.). These guidelines stated that the "major Federal actions" to which § 102 (2)(C) applied included "[r]ecommendations or favorable reports relating to leg-

and on the Department of the Interior's Manual,[11] the District Court held that "appropriation requests are 'proposals for legislation' within the meaning of NEPA," and also that "annual proposals for financing the Refuge System are major Federal actions which clearly have a significant effect on the environment." *Sierra Club* v. *Morton*, 395 F. Supp. 1187, 1188, 1189 (1975). The District Court granted respondents' motion for summary judgment, and provided declaratory and injunctive relief. It stated that the Department of the Interior and OMB were required "to prepare, consider, and disseminate environmental impact statements on annual proposals for financing the National Wildlife Refuge System." [12] App. to Pet. for Cert. 61a.

The Court of Appeals for the District of Columbia Circuit modified the holding of the District Court. The Court of Appeals was apprehensive because "[a] rule requiring preparation of an EIS on the annual budget request for virtually every ongoing program would trivialize NEPA." 189 U. S. App. D. C. 117, 125, 581 F. 2d 895, 903 (1978). Therefore, the Court of Appeals concluded that § 102 (2)(C) required

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islation including requests for appropriations." 40 CFR § 1500.5 (a)(1) (1974). See § 1500.3.

[11] At that time the Department of the Interior's Manual, following CEQ's proposed guidelines, provided:

"The following criteria are to be used in deciding whether a proposed action requires the preparation of an environmental statement:

"A. Types of Federal actions to be considered include, but are not limited to:

"(1) Recommendations or favorable reports to the Congress relating to legislation, including appropriations." Department of the Interior Manual, § 516.5, 36 Fed. Reg. 19344 (1971).

[12] Without additional discussion, the District Court also stated that the Director of OMB was required "to develop formal methods and procedures which will, with respect to [OMB]'s own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated." App. to Pet. for Cert. 62a. See n. 9, *supra*.

the preparation of an EIS only when an appropriation request accompanies "a 'proposal' for taking new action which significantly changes the status quo," or when "the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review." 189 U. S. App. D. C., at 125, 581 F. 2d, at 903. Section 102 (2)(C) would thus have no application to "a routine request for budget approval and appropriations for continuance and management of an ongoing program." 189 U. S. App. D. C., at 125, 581 F. 2d, at 903. The Court of Appeals held, however, that there was no need for injunctive relief because the Fish and Wildlife Service had completed during the pendency of the appeal a "Programmatic EIS" that adequately evaluated the environmental consequences for the NWRS of various budgetary alternatives.[13] *Id.*, at 126, 581 F. 2d, at 904. See United States Fish and Wildlife Service, Final Environmental Statement: Operation of the National Wildlife Refuge System (Nov. 1976).[14]

We granted certiorari, 439 U. S. 1065 (1979), and we now reverse.

II

NEPA requires EIS's to be included in recommendations or reports on both "proposals for legislation . . . significantly affecting the quality of the human environment" and "proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (2)(C). See CEQ regulations, 43 Fed. Reg. 56001 (1978) (to be codified at 40 CFR § 1506.8 (a)). Petitioners argue, however, that the requirements of § 102 (2)(C) have no application to the budget process. The contrary holding of the

[13] Respondents do not now challenge this holding.

[14] The Court of Appeals also affirmed what it took to be the District Court's declaratory relief requiring OMB "to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process . . . ." 189 U. S. App. D. C., at 127, 581 F. 2d, at 905. See n. 12, *supra*.

Court of Appeals rests on two alternative interpretations of § 102 (2)(C). The first is that appropriation requests which are the result of "an agency's painstaking review of an ongoing program," 189 U. S. App. D. C., at 125, 581 F. 2d, at 903, are "proposals for legislation" within the meaning of § 102 (2)(C). The second is that appropriation requests which are the reflection of "new" agency initiatives constituting "major Federal actions" under NEPA, are themselves "proposals for . . . major Federal actions" for purposes of § 102 (2)(C). We hold that neither interpretation is correct.

A

We note initially that NEPA makes no distinction between "proposals for legislation" that are the result of "painstaking review," and those that are merely "routine." When Congress has thus spoken "in the plainest of words," *TVA* v. *Hill*, 437 U. S. 153, 194 (1978), we will ordinarily decline to fracture the clear language of a statute, even for the purpose of fashioning from the resulting fragments a rule that "accords with 'common sense and the public weal.'" *Id.*, at 195. Therefore, either all appropriation requests constitute "proposals for legislation," or none does.

There is no direct evidence in the legislative history of NEPA that enlightens whether Congress intended the phrase "proposals for legislation" to include requests for appropriations. At the time of the Court of Appeals' decision, however, CEQ guidelines provided that § 102 (2)(C) applied to "[r]ecommendations or favorable reports relating to legislation including requests for appropriations." 40 CFR § 1500.5 (a)(1) (1977).[15] At that time CEQ's guidelines were advi-

[15] CEQ had taken this position from the first draft of its guidelines. CEQ was required by President Nixon to issue guidelines on March 5, 1970. See Exec. Order No. 11514, 3 CFR 902 (1966–1967 Comp.). On April 30, 1970, CEQ promulgated interim guidelines which provided that "major Federal actions" included "[r]ecommendations or reports relating to legislation and appropriations." Council on Environmental

sory in nature, and were for the purpose of assisting federal agencies in complying with NEPA. § 1500.1 (a).

In 1977, however, President Carter, in order to create a single set of uniform, mandatory regulations, ordered CEQ, "after consultation with affected agencies," to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions" of NEPA. Exec. Order No. 11991, 3 CFR 124 (1978). The President ordered the heads of federal agencies to "comply with the regulations issued by the Council . . . ." *Ibid.* CEQ has since issued these regulations, 43 Fed. Reg. 55978–56007 (1978),[16] and they reverse CEQ's prior interpretation of § 102 (2)(C). The regulations provide specifically that " '[l]egislation' includes a bill or legislative proposal to Congress . . . but does *not* include requests for appropriations." 43 Fed. Reg. 56004 (1978) (to be codified at 40 CFR § 1508.17). (Emphasis supplied.) CEQ explained this reversal by noting that, on the basis of "traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors, . . . the Council in its experience found that preparation of EISs is ill-suited to the budget preparation process." [17] 43 Fed. Reg., at 55989.

Quality, First Annual Report: Environmental Quality 288 (1970). On April 23, 1971, the guidelines were revised to state that "major Federal actions" included "[r]ecommendations or favorable reports relating to legislation including that for appropriations." 36 Fed. Reg. 7724 (1971). On August 1, 1973, the guidelines were once again revised, this time to the form noted by the Court of Appeals. 38 Fed. Reg. 20551 (1973).

Relying on the CEQ guidelines, two prior decisions by Courts of Appeals have both interpreted "proposals for legislation" to include appropriation requests. See *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164, 1181 (CA6 1972); *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Comm'n*, 156 U. S. App. D. C. 395, 404, 481 F. 2d 1079, 1088 (1973).

[16] These regulations become effective July 30, 1979. 43 Fed. Reg. 55978 (1978).

[17] The CEQ also noted that "[n]othing in the Council's determination, however, relieves agencies of responsibility to prepare statements when

CEQ's interpretation of NEPA is entitled to substantial deference. See *Warm Springs Dam Task Force* v. *Gribble*, 417 U. S. 1301, 1309–1310 (1974) (Douglas, J., in chambers). The Council was created by NEPA, and charged in that statute with the responsibility "to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in . . . this Act . . . , and to make recommendations to the President with respect thereto." 83 Stat. 855, 42 U. S. C. § 4344 (3).

It is true that in the past we have been somewhat less inclined to defer to "administrative guidelines" when they have "conflicted with earlier pronouncements of the agency." *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976). But CEQ's reversal of interpretation occurred during the detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies. See *American Trucking Assns.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 416 (1967). A mandatory requirement that every federal agency submit EIS's with its appropriation requests raises wholly different and more serious issues "of fair and prudent administration," *ibid.*, than does nonbinding advice. This is particularly true in light of the Court of Appeals' correct observation that "[a] rule requiring preparation of an EIS on the annual budget request for virtually every ongoing program would trivialize NEPA." 189 U. S. App. D. C., at 125, 581 F. 2d, at 903. The Court of Appeals accurately noted that such an interpretation of NEPA would be a *"reductio ad absurdum* . . . . It would be absurd to require an EIS on every decision on the management of federal land, such as fluctuation in the number of forest fire spotters." *Id.*, at 124, 581 F. 2d, at 902. Even respondents do not now contend that NEPA should be construed so

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otherwise required on the underlying program or other actions." *Id.*, at 55989.

that all appropriation requests constitute "proposals for legislation." Brief for Respondents 13 n. 6, 55–61.

CEQ's interpretation of the phrase "proposals for legislation" is consistent with the traditional distinction which Congress has drawn between "legislation" and "appropriation." [18] The rules of both Houses "prohibit 'legislation'

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[18] The Congressional Budget Act of 1974 directs the Comptroller General of the United States, "in cooperation with the Secretary of the Treasury, the Director of the Office of Management and Budget, and the Director of the Congressional Budget Office, [to] develop, establish, maintain, and publish standard terminology, definitions, classifications, and codes for Federal fiscal, budgetary, and program-related data and information." 88 Stat. 327, 31 U. S. C. § 1152 (a)(1). Pursuant to this statutory authority, the Comptroller General has published definitions distinguishing "authorizing legislation" from "appropriation." *Authorizing legislation* is defined in the following manner:

"Basic substantive legislation enacted by Congress which sets up or continues the legal operation of a Federal program or agency either indefinitely or for a specific period of time or sanctions a particular type of obligation or expenditure within a program. Such legislation is normally a prerequisite for subsequent appropriations or other kinds of budget authority to be contained in appropriations acts. It may limit the amount of budget authority to be provided subsequently or may authorize the appropriation of 'such sums as may be necessary.'" Comptroller General of the United States, Terms Used in the Budgetary Process 4 (1977).

Appropriation, on the other hand, is defined as:

"An authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes. An appropriation usually follows enactment of authorizing legislation. . . . Appropriations do not represent cash actually set aside in the Treasury for purposes specified in the appropriation act; they represent limitations of amounts which agencies may obligate during the time period specified in the respective appropriations acts." *Id.*, at 3.

Congressional enactments employ this distinction between appropriation and legislation. For example, the Budget and Accounting Act requires the President to include in the proposed budget he submits to Congress

"with respect to each proposal in the Budget for new or additional *legislation* which would create or expand any function, activity, or authority, in

from being added to an appropriation bill." L. Fisher, Budget Concepts and Terminology: The Appropriations Phase, in 1 Studies in Taxation, Public Finance and Related Subjects—A Compendium 437 (Fund for Public Policy Research 1977). See Standing Rules of the United States Senate, Rule 16 (4) ("No amendment which proposes general legislation shall be received to any general appropriation bill . . ."); Rules of the House of Representatives, 96th Cong., 1st Sess.,

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addition to those functions, activities, and authorities then existing or as then being administered and operated, a tabulation showing—

"(A) the amount proposed in the Budget for *appropriation* and for expenditure in the ensuing fiscal year on account of such proposal; and

"(B) the estimated *appropriation* required on account of such proposal in each of the four fiscal years, immediately following that ensuing fiscal year, during which such proposal is to be in effect . . . ." As added, 84 Stat. 1169, 31 U. S. C. § 11 (a)(12) (emphasis supplied).

See also 18 U. S. C. § 1913; 22 U. S. C. § 2394 (c).

The Executive Branch also recognizes the distinction between appropriation and legislation. For example, OMB distinguishes its function "[t]o supervise and control the administration of the budget" from its task of assisting "the President by clearing and coordinating departmental advice on proposed legislation." Requiring Confirmation of Future Appointments of the Director and Deputy Director of the Office of Management and Budget, H. R. Rep. No. 93–697, p. 18 (1973). See Neustadt, Presidency and Legislation: The Growth of Central Clearance, 48 Am. Pol. Sci. Rev. 641 (1954). OMB Circular No. A–19 (1972) establishes OMB's procedures for "legislative coordination and clearance," whereas OMB Circular No. A–11 (1978) sets out OMB's guidelines for the "Preparation and Submission of Budget Estimates." OMB Circular No. A–19, § 6 (a), requires each federal agency to "prepare and submit to OMB annually its proposed legislative program for the next session of Congress. These programs must be submitted at the same time as the initial submissions of an agency's annual budget request as required by OMB Circular A–11." OMB Circular A–11, § 13.2, on the other hand, provides:

"If, in addition to the regular appropriation requests, it appears probable that proposals for *new legislation* may require a further budget request or result in a change in revenues or outlays, a tentative forecast of the supplemental estimate will be set forth separately. . . . Such proposed supplementals must be consistent with items appearing in the agency's legislative program as required by OMB Circular No. A–19 . . . ."

Rule XXI (2) (1979);[19] 7 C. Cannon, Precedents of the House of Representatives §§ 1172, 1410, 1443, 1445, 1448, 1459, 1463, 1470, 1472 (1936). The distinction is maintained "to assure that program and financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation." House Budget Committee, Congressional Control of Expenditures 19 (Comm. Print 1977). House and Senate rules thus require a "previous choice of policy . . . before any item of appropriations might be included in a general appropriations bill." *United States ex rel. Chapman* v. *FPC*, 345 U. S. 153, 164 n. 5 (1953). Since appropriations therefore "have the limited and specific purpose of providing funds for authorized programs," *TVA* v. *Hill*, 437 U. S., at 190, and since the "action-forcing" provisions of NEPA are directed precisely at the processes of "planning and . . . decisionmaking," 42 U. S. C. § 4332 (2)(A), which are associated with underlying legislation, we conclude that the distinction made by CEQ's regulations is correct and that "proposals for legislation" do not include appropriation requests.

B

The Court of Appeals' alternative interpretation of NEPA is that appropriation requests constitute "proposals for . . . major Federal actions."[20] But this interpretation distorts the

[19] L. Deschler, Procedure in the U. S. House of Representatives § 26–1.2 (1977) states that "[l]anguage in an appropriation bill changing existing law is legislation and not in order." Conversely, "[r]estrictions against the inclusion of appropriations in legislative bills are provided for by House rule . . . ." *Id.*, § 25–3.1.

[20] CEQ regulations define "major Federal action" in the following manner:

" 'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly . . . . Actions include the circumstance where the responsible offi-

language of the Act, since appropriation requests do not "propose" federal actions at all; they instead fund actions already proposed. Section 102 (2)(C) is thus best interpreted as applying to those recommendations or reports that actually propose programmatic actions, rather than to those which merely suggest how such actions may be funded. Any other result would create unnecessary redundancy. For example, if the mere funding of otherwise unaltered agency programs were construed to constitute major federal actions significantly affecting the quality of the human environment, the resulting EIS's would merely recapitulate the EIS's that should have accompanied the initial proposals of the programs. And if an agency program were to be expanded or revised in a manner that constituted major federal action

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cials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

"(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals . . . .

"(b) Federal actions tend to fall within one of the following categories:

"(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U. S. C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

"(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

"(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

"(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 43 Fed. Reg. 56004–56005 (1978) (to be codified at 40 CFR § 1508.18).

significantly affecting the quality of the human environment,[21] an EIS would have been required to accompany the underlying programmatic decision.[22] An additional EIS at the appropriation stage would add nothing.

Even if changes in agency programs occur *because* of budgetary decisions, an EIS at the appropriation stage would only be repetitive. For example, respondents allege in their complaint that OMB required the Fish and Wildlife Service to decrease its appropriation request for the NWRS, and that this decrease would alter the operation of the NWRS in a manner that would significantly affect the quality of the human environment. See n. 9, *supra*. But since the Fish and Wildlife Service could respond to OMB's budgetary curtailments in a variety of ways, see United States Fish and Wildlife Service, Final Environmental Statement: Operation of the National Wildlife Refuge System (Nov. 1976), it is impossible to predict whether or how any particular budget cut will in fact significantly affect the quality of the human environment. OMB's determination to cut the Service's budget is not a programmatic proposal, and therefore requiring OMB to include an EIS in its budgetary cuts would be premature. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 320 (1975). And since an EIS must be prepared if any of the revisions the Fish and Wildlife Service proposes in its ongoing programs in response to OMB's budget cuts would significantly affect the quality of the human environment, requiring the Fish and Wildlife Service to include an EIS with its revised appropriation request would merely be redundant.

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[21] "[M]ajor Federal actions" include the "expansion or revision of ongoing programs." S. Rep. No. 91–296, p. 20 (1969).

[22] For example, if an agency were to seek an appropriation to initiate a major new program that would significantly affect the quality of the human environment, or if it were to decline to ask for funding so as to terminate a program with a similar effect, the agency would have been required to include EIS's in the recommendations or reports on the proposed underlying programmatic decisions.

Moroever, this redundancy would have the deleterious effect of circumventing and eliminating the careful distinction Congress has maintained between appropriation and legislation. It would flood House and Senate Appropriations Committees with EIS's focused on the policy issues raised by underlying authorization legislation,[23] thereby dismantling the "division of labor" so deliberately created by congressional rules.

C

We conclude therefore, for the reasons given above, that appropriation requests constitute neither "proposals for legis-

[23] The Court of Appeals held that EIS's need be included in appropriation requests for "major Federal actions" only if major changes that would significantly affect the quality of the human environment are proposed in the underlying programs for which funding is sought. See 189 U. S. App. D. C., at 125, 581 F. 2d, at 903. But an appropriation request applies not only to major changes in a federal program, but also to the entire program it is designed to fund. Without appropriations, the underlying program would cease to exist. Therefore, if the existence *vel non* of that program is a major federal action significantly affecting the quality of the human environment, the Court of Appeals' alternative interpretation of NEPA would require an EIS to be included in the concomitant appropriation request.

It is important to note that CEQ regulations provide that the adjective "major" in the phrase "major Federal actions" "reinforces but does not have a meaning independent of [the adverb] significantly" in the phrase "significantly affecting the quality of the human environment." 43 Fed. Reg. 56004 (1978) (to be codified at 40 CFR § 1508.18). See n. 20, *supra*. As a consequence, the Court of Appeals' holding that certain appropriation requests are "proposals for . . . major Federal actions" is operationally identical to its holding that certain appropriation requests constitute "proposals for legislation." Both holdings would require EIS's to accompany funding requests for every federal program that significantly affects the quality of the human environment. Thus, not only do both holdings run the same dangers of "trivializing" NEPA, but also the same "traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality," 43 Fed. Reg. 55989 (1978), which led CEQ to distinguish "appropriations" from "legislation," would require appropriations to be distinguished from "proposals for . . . major Federal actions."

lation" nor "proposals for . . . major Federal actions," and that therefore the procedural requirements of § 102 (2)(C) have no application to such requests.[24] The judgment of the Court of Appeals is reversed.

So ordered.

[24] Because we conclude that § 102 (2)(C) has no application to appropriation requests, it is clear that the Court of Appeals was incorrect in requiring OMB "to adopt procedures and appropriate regulations to comply with the obligations NEPA imposes on the budget process . . . ." 189 U. S. App. D. C., at 127, 581 F. 2d, at 905. See n. 14, *supra*.

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. *v.* NOVOTNY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–753. Argued April 18, 1979—Decided June 11, 1979

After respondent, a former officer, director, and loan officer of petitioner Great American Federal Savings and Loan Association (Association) received a right-to-sue letter upon filing a complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, he brought this suit against the Association and its directors in Federal District Court, alleging that the Association had intentionally embarked upon a course of conduct the effect of which was to deny to female employees equal employment opportunity; that when respondent expressed support for the female employees at a meeting of the board of directors, his connection with the Association abruptly ended; and that his support for the female employees was the cause of the termination of his employment. Respondent claimed damages under 42 U. S. C. § 1985 (3) (1976 ed., Supp. II), contending that he had been injured as the result of a conspiracy to deprive him of equal protection of, and equal privileges and immunities under, the laws. Section 1985 (3) provides, *inter alia*, that a person so injured may have an action for damages against any one or more of the conspirators. The District Court granted petitioners' motion to dismiss, holding that § 1985 (3) could not be invoked because the directors of a single corporation cannot, as a matter of law and fact, engage in a conspiracy. The Court of Appeals reversed, holding that conspiracies motivated by an invidious animus against women fall within § 1985 (3), and that respondent, a male allegedly injured as a result of such a conspiracy, has standing to bring suit under that provision. The court further ruled that Title VII can be the source of a right asserted in a § 1985 (3) action, and that intracorporate conspiracies come within the intendment of the section.

Held: Section 1985 (3) may not be invoked to redress violations of Title VII. It creates no substantive rights itself but is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section. Thus, the question in this case is whether rights created by Title VII—respondent alleged that he was injured

by a conspiracy to violate § 704 (a) of Title VII, which makes it an unlawful employment practice for an employer to discriminate against an employee because he has opposed any employment practice made unlawful by Title VII or because he has participated in an investigation or proceeding under Title VII—may be asserted within the *remedial* framework of § 1985 (3). If a violation of Title VII could be asserted through § 1985 (3), a complainant could avoid most if not all of the detailed and specific provisions of Title VII, which provides a comprehensive plan of administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII. Unimpaired effectiveness can be given to the plan of Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985 (3). Cf. *Brown* v. *GSA*, 425 U. S. 820. Pp. 370–378.

584 F. 2d 1235, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., *post*, p. 378, and STEVENS, J., *post*, p. 381, filed concurring opinions. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 385.

Eugene K. Connors argued the cause for petitioners. With him on the briefs was *Walter G. Bleil.*

Stanley M. Stein argued the cause and filed a brief for respondent.

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae* urging affirmance. On the brief were *Solicitor General McCree, Assistant Attorney General Days, Louis F. Claiborne, Walter W. Barnett, Mildred M. Matesich, Lutz Alexander Prager,* and *Paul E. Mirengoff.**

**Avrum M. Goldberg, William R. Weissman, Robert E. Williams,* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Isabelle Katz Pinzler filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

More than a century after their passage, the Civil Rights Acts of the Reconstruction Era continue to present difficult problems of statutory construction. Cf. *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600. In the case now before us, we consider the scope of 42 U. S. C. § 1985 (3) (1976 ed., Supp. II), the surviving version of § 2 of the Civil Rights Act of 1871.[1]

I

The respondent, John R. Novotny, began his career with the Great American Federal Savings and Loan Association (hereinafter Association) in Allegheny County, Pa., in 1950. By 1975, he was secretary of the Association, a member of its board of directors, and a loan officer. According to the allegations of the complaint in this case the Association "intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny to female employees

[1] Title 42 U. S. C. § 1985 (3) (1976 ed., Supp. II), Rev. Stat. § 1980, provides:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

equal employment opportunity . . . ." When Novotny expressed support for the female employees at a meeting of the board of directors, his connection with the Association abruptly ended. He was not re-elected as secretary; he was not re-elected to the board; and he was fired. His support for the Association's female employees, he alleges, was the cause of the termination of his employment.

Novotny filed a complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964.[2] After receiving a right-to-sue letter,[3] he brought this lawsuit against the Association and its directors in the District Court for the Western District of Pennsylvania. He claimed damages under 42 U. S. C. § 1985 (3) (1976 ed., Supp. II), contending that he had been injured as the result of a conspiracy to deprive him of equal protection of and equal privileges and immunities under the laws.[4] The District Court granted the defendants' motion to dismiss. It held that § 1985 (3) could not be invoked because the directors of a single corporation could not, as a matter of law and fact, engage in a conspiracy. 430 F. Supp. 227, 230.[5]

Novotny appealed. After oral argument before a three-judge panel, the case was reargued before the en banc Court of Appeals for the Third Circuit, which unanimously reversed

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[2] 42 U. S. C. § 2000e *et seq.*

[3] 42 U. S. C. § 2000e–5 (f) (1).

[4] His complaint also alleged, as a second cause of action, that his discharge was in retaliation for his efforts on behalf of equal employment opportunity, and thus violated § 704 (a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 257, as amended, 86 Stat. 109. Section 704 (a), as set forth in 42 U. S. C. § 2000e–3 (a), reads in relevant part:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

[5] As to the Title VII claim, the District Court held that Novotny was not a proper plaintiff under § 704 (a).

the District Court's judgment. 584 F. 2d 1235. The Court of Appeals ruled that Novotny had stated a cause of action under § 1985 (3). It held that conspiracies motivated by an invidious animus against women fall within § 1985 (3), and that Novotny, a male allegedly injured as a result of such a conspiracy, had standing to bring suit under that statutory provision. It ruled that Title VII could be the source of a right asserted in an action under § 1985 (3), and that intracorporate conspiracies come within the intendment of the section. Finally, the court concluded that its construction of § 1985 (3) did not present any serious constitutional problem.[6]

We granted certiorari, 439 U. S. 1066, to consider the applicability of § 1985 (3) to the facts alleged in Novotny's complaint.

II

The legislative history of § 2 of the Civil Rights Act of 1871, of which § 1985 (3) was originally a part, has been reviewed many times in this Court.[7] The section as first en-

[6] The Court of Appeals ruled that Novotny had also stated a valid cause of action under Title VII. It held that § 704 (a) applies to retaliation for both formal and informal actions taken to advance the purposes of the Act. That holding is not now before this Court.

We note the relative narrowness of the specific issue before the Court. It is unnecessary for us to consider whether a plaintiff would have a cause of action under § 1985 (3) where the defendant was not subject to suit under Title VII or a comparable statute. Cf. *United States* v. *Johnson*, 390 U. S. 563. Nor do we think it necessary to consider whether § 1985 (3) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution. Cf. *Griffin* v. *Breckenridge*, 403 U. S. 88.

[7] A partial list of the opinions in this Court that have discussed the Act's legislative history includes *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 608–612 (opinion of the Court); *id.*, at 650–658 (WHITE, J., concurring in judgment); *id.*, at 627–640 (POWELL, J., concurring); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 665–689; *District of Columbia* v. *Carter*, 409 U. S. 418, 423, 425–429; *Griffin* v. *Breckenridge*, *supra*, at 99–101; *Adickes* v. *S. H. Kress Co.*, 398

acted authorized both criminal and civil actions against those who have conspired to deprive others of federally guaranteed rights. Before the 19th century ended, however, the Court found the criminal provisions of the statute unconstitutional because they exceeded the scope of congressional power, *United States* v. *Harris,* 106 U. S. 629; *Baldwin* v. *Franks,* 120 U. S. 678, and the provisions thus invalidated were later formally repealed by Congress. The civil action provided by the Act remained, but for many years was rarely, if ever, invoked.

The provisions of what is now § 1985 (3) were not fully considered by this Court until 1951, in the case of *Collins* v. *Hardyman,* 341 U. S. 651.[8] There the Court concluded that the section protected citizens only from injuries caused by conspiracies "under color of state law."[9] Twenty years later, in *Griffin* v. *Breckenridge,* 403 U. S. 88, the Court unanimously concluded that the *Collins* Court had accorded to the provisions of § 1985 (3) too narrow a scope.[10] The fears concerning congressional power that had motivated the Court in

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U. S. 144, 162–166 (opinion of the Court); *id.,* at 215–231 (BRENNAN, J., concurring in part and dissenting in part); *Monroe* v. *Pape,* 365 U. S. 167, 172–185 (opinion of the Court); *id.,* at 194–198 (Harlan, J., concurring in judgment); *id.,* at 225–236 (Frankfurter, J., dissenting).

[8] At least two earlier cases in this Court involved causes of action based upon what is now § 1985 (3). In *Hague* v. *CIO,* 307 U. S. 496, the plaintiff had stated claims based on the predecessors of both § 1985 (3) and 42 U. S. C. § 1983. The opinions of Mr. Justice Roberts and Mr. Justice Stone both discussed the § 1983 cause of action, but neither discussed the conspiracy claim. In *Snowden* v. *Hughes,* 321 U. S. 1, the plaintiff had also stated claims under the predecessors of both sections. The Court held that no constitutional violation had been shown, and did not consider whether the statutes could have been utilized if such a showing had been made.

[9] Mr. Justice Burton dissented, joined by Mr. Justice Black and Mr. Justice Douglas. 341 U. S., at 663.

[10] Mr. Justice Harlan concurred, with one reservation. He found it unnecessary to rely, as the Court did in part, on the defendants' alleged interference with the right of interstate travel. 403 U. S., at 107.

the *Collins* case had been dissolved by intervening cases. See *Griffin* v. *Breckenridge*, *supra*, at 96–97, 104–106. Therefore, the Court found that § 1985 (3) did provide a cause of action for damages caused by purely private conspiracies.

The Court's opinion in *Griffin* discerned the following criteria for measuring whether a complaint states a cause of action under § 1985 (3):

> "To come within the legislation a complaint must allege that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of [the] conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.' " 403 U. S., at 102–103.

Section 1985 (3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates. The primary question in the present case, therefore, is whether a person injured by a conspiracy to violate § 704 (a) of Title VII of the Civil Rights Act of 1964 is deprived of "the equal protection of the laws, or of equal privileges and immunities under the laws" within the meaning of § 1985 (3).[11]

Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and

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[11] For the purposes of this question, we assume but certainly do not decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985 (3).

nonadversary resolution of claims. As the Court explained in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44:

> "Congress enacted Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit."

As part of its comprehensive plan, Congress provided that a complainant in a State or locality with a fair employment commission must first go to that commission with his claim. Alternatively, an employee who believes himself aggrieved must first file a charge with the federal Equal Employment Opportunity Commission.[12] The time limitations for administrative and judicial filing are controlled by express provisions of the statute.[13] At several different points, the statutory

[12] Title 42 U. S. C. § 2000e–5 (b) provides for filing charges with the federal Commission. When a State or locality has a "State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto," filing a complaint with that authority is a predicate for assertion of the federal rights involved. 42 U. S. C. § 2000e–5 (c). If a member of the EEOC files a charge alleging violations in such a State or locality, the federal Commission must notify the state or local authority of the charge before taking any action. 42 U. S. C. § 2000e–5 (d). Cf. *Love* v. *Pullman Co.*, 404 U. S. 522.

[13] The statute requires that a complaint be filed with the federal agency within 180 days "after the alleged unlawful employment practice

plan prevents immediate filing of judicial proceedings in order to encourage voluntary conciliation.[14] The EEOC has the power to investigate and to prosecute a civil action in a complainant's case.[15] The Act provides for injunctive relief, specifically including backpay relief.[16] The majority of the

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occurred . . . ." If the complainant has filed a charge with a state or local agency, the time is extended to 300 days from the event, or 30 days from the end of state or local proceedings, whichever is sooner. 42 U. S. C. § 2000e–5 (e). After a "right to sue" letter issues from the EEOC, the complainant is given another 90 days to bring a civil action in a federal district court. 42 U. S. C. § 2000e–5 (f)(1). Cf. *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553.

[14] Within 10 days of the Commission's receipt of a complaint, it must notify the employer of the charge, including the date, place, and circumstances of the alleged violation. 42 U. S. C. §§ 2000e–5 (b), (e). Only if the Commission has been unable to secure an acceptable conciliation agreement from the employer within 30 days of the filing of the charge may it bring a civil action against the employer. 42 U. S. C. § 2000e–5 (f)(1). The complainant must await notice from the Commission of his right to bring a suit. This notice is provided if (1) the Commission dismisses his charge, (2) neither the Commission nor the Attorney General has filed a civil action in his case within 180 days of the filing of the charge, or (3) the Commission has not entered into a conciliation agreement to which he is a party. 42 U. S. C. § 2000e–5 (f)(1). Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355.

[15] 42 U. S. C. §§ 2000e–5 (a), (b), (f)(1). See *Occidental Life Ins. Co.* v. *EEOC*, *supra*.

[16] Section 706 (g) of the Act, as amended, as set forth in 42 U. S. C. § 2000e–5 (g), provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the

federal courts have held that the Act does not allow a court to award general or punitive damages.[17] The Act expressly allows the prevailing party to recover his attorney's fees, and, in some cases, provides that a district court may appoint counsel for a plaintiff.[18] Because the Act expressly authorizes only equitable remedies, the courts have consistently held that neither party has a right to a jury trial.[19]

If a violation of Title VII could be asserted through § 1985 (3), a complainant could avoid most if not all of these de-

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person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3 (a) of this title."

See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405.

[17] See *EEOC* v. *Detroit Edison Co.*, 515 F. 2d 301, 308–310 (CA6 1975); *Richerson* v. *Jones*, 551 F. 2d 918, 926–928 (CA3 1977); cases collected in *id.*, at 926 n. 13.

[18] Title 42 U. S. C. § 2000e–5 (k) provides:

"In any action or proceeding under this subchapter the court in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412.

Title 42 U. S. C. § 2000e–5 (f)(1) provides that "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security."

[19] See *Slack* v. *Havens*, 522 F. 2d 1091, 1094 (CA9 1975); *EEOC* v. *Detroit Edison Co.*, *supra*, at 308; *Johnson* v. *Georgia Highway Express*, 417 F. 2d 1122, 1125 (CA5 1969); *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577, 581 (CA4 1966) (en banc). See also *Albemarle Paper Co.* v. *Moody*, *supra*, at 441–445 (REHNQUIST, J., concurring).

tailed and specific provisions of the law. Section 1985 (3) expressly authorizes compensatory damages; punitive damages might well follow. The plaintiff or defendant might demand a jury trial. The short and precise time limitations of Title VII would be grossly altered.[20] Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.

The problem in this case is closely akin to that in *Brown* v. *GSA*, 425 U. S. 820. There, we held that § 717 of Title VII provides the exclusive remedy for employment discrimination claims of those federal employees that it covers. Our conclusion was based on the proposition that

> "[t]he balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717 (c) was designed merely to supplement other putative judicial relief." 425 U. S., at 832.

Here, the case is even more compelling. In *Brown*, the Court concluded that § 717 displaced other causes of action arguably available to assert substantive rights similar to those granted by § 717. Section 1985 (3), by contrast, *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section. Thus, we are not faced in this case with a question of implied repeal. The right Novotny claims under § 704 (a) did not even arguably exist before the passage of Title

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[20] The Court of Appeals for the Third Circuit recently applied a 6-year Pennsylvania statute of limitations to employment discrimination claims brought under 42 U. S. C. § 1981. *Davis* v. *United States Steel Supply*, 581 F. 2d 335, 337 (1978). See also *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 462–466.

VII. The only question here, therefore, is whether the rights created by Title VII may be asserted within the *remedial* framework of § 1985 (3).

This case thus differs markedly from the cases recently decided by this Court that have related the substantive provisions of last century's Civil Rights Acts to contemporary legislation conferring similar substantive rights. In those cases we have held that substantive rights conferred in the 19th century were not withdrawn, *sub silentio,* by the subsequent passage of the modern statutes. Thus, in *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 413–417, we considered the effect of the fair housing provisions of the Civil Rights Act of 1968 on the property rights guaranteed by the Civil Rights Act of 1866, now codified at 42 U. S. C. § 1982. And in *Johnson* v. *Railway Express Agency,* 421 U. S. 454, 457–461, we held that the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the same 19th-century statute and now codified at 42 U. S. C. § 1981. See also *Sullivan* v. *Little Hunting Park,* 396 U. S. 229, 237–238; *Runyon* v. *McCrary,* 427 U. S. 160, 174–175.[21]

Somewhat similarly, in *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, the Court upheld an employee's invocation of two alternative remedies for alleged employment discrimina-

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[21] Another difference between those cases and this one is to be found in the legislative history of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1968. As the Court noted in *Johnson* v. *Railway Express Agency, supra,* and *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, the Civil Rights Acts of 1866 and 1871 were explicitly discussed during the course of the legislative debates on both the Civil Rights Act of 1968 and the 1972 amendments to the 1964 Act, and the view was consistently expressed that the earlier statutes would not be implicitly repealed. See *Johnson* v. *Railway Express Agency, supra,* at 457–459; *Jones* v. *Alfred H. Mayer Co., supra,* at 413–417. Specific references were made to §§ 1981 and 1983, but, significantly, no notice appears to have been taken of § 1985. See case below, 584 F. 2d 1235, 1252 n. 86.

tion: arbitration under a collective-bargaining agreement, and litigation under Title VII. As the Court pointed out:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *Id.*, at 49–50.

This case, by contrast, does not involve two "independent" rights, and for the same basic reasons that underlay the Court's decision in *Brown* v. *GSA*, *supra*, reinforced by the other considerations discussed in this opinion, we conclude that § 1985 (3) may not be invoked to redress violations of Title VII. It is true that a § 1985 (3) remedy would not be coextensive with Title VII, since a plaintiff in an action under § 1985 (3) must prove both a conspiracy and a group animus that Title VII does not require. While this incomplete congruity would limit the damage that would be done to Title VII, it would not eliminate it. Unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985 (3).

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I agree with the opinion of the Court as far as it goes, and I join it. I also agree with the views expressed by MR. JUSTICE STEVENS' concurring opinion. I write separately because

it seems to me that the Court's decision affords unnecessarily limited guidance to courts in the federal system.

The Court's specific holding is that 42 U. S. C. § 1985 (3) (1976 ed., Supp. II) may not be invoked to redress violations of Title VII. The broader issue argued to us in this case was whether this Civil War Era remedial statute, providing no substantive rights itself, was intended to provide a remedy generally for the violation of subsequently created statutory rights. For essentially the reasons suggested by MR. JUSTICE STEVENS, I would hold that § 1985 (3) should not be so construed, and that its reach is limited to conspiracies to violate those fundamental rights derived from the Constitution.

The Court's unanimous decision in *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), is to this effect. The alleged conspiracy there was an attempt by white citizens, resorting to force and violence, to deprive Negro citizens of the right to use interstate highways. In sustaining a cause of action under § 1985 (3), the Court found that the alleged conspiracy—if implemented—would violate the constitutional "right of interstate travel" as well as the right of Negro citizens to be free from "invidiously discriminatory" action. The Court declared:

> "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' [Cong. Globe, 42d Cong., 1st Sess., 485 (1871).] The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously

discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U. S., at 101–102.

In reaching its conclusion, the Court identified "two constitutional sources" (*id.*, at 107) relied upon to support a cause of action under § 1985 (3):

> "We can only conclude that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.
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> . . . . . .
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> "Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference. [Citations omitted.] The 'right to pass freely from State to State' has been explicitly recognized as 'among the rights and privileges of National citizenship.' *Twining* v. *New Jersey*, 211 U. S. 78, 97. That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation." *Id.*, at 105–106.

By contrast, this Court has never held that the right to any particular private employment is a "right of national citizenship," or derives from any other right created by the Constitution. Indeed, even Congress, in the exercise of its

powers under the Commerce Clause of the Constitution, has accorded less than full protection to private employees. It excluded several classes of employers from the coverage of Title VII, for example, employers of fewer than 15 employees. See 42 U. S. C. § 2000e (b). Nor does the Constitution create any right to be free of gender-based discrimination perpetuated solely through private action.

The rationale of *Griffin* accords with the purpose, history, and common understanding of this Civil War Era statute. Rather than leave federal courts in any doubt as to the scope of actions under § 1985 (3), I would explicitly reaffirm the constitutional basis of *Griffin*.*

MR. JUSTICE STEVENS, concurring.

While I join the Court's opinion, including its reliance on *Brown* v. *GSA*, 425 U. S. 820, and while I agree with much of MR. JUSTICE POWELL's concurrence, I add a few words of my own to explain why I would reach the same conclusion even if the Court had agreed with my dissenting views in *Brown*.

Sections 1983 and 1985 (3) of Title 42 of the United States Code (1976 ed., and Supp. II) are the surviving direct descendants of §§ 1 and 2 of the Civil Rights Act of 1871. 17 Stat. 13. Neither of these sections created any substantive rights. Earlier this Term we squarely held that § 1983

*The doubts which will remain after the Court's decision are far from insubstantial. At least one federal court, for example, has held that although Title VII rights may not be asserted through § 1985 (3), claims based on § 3 of the Equal Pay Act of 1963, 77 Stat. 56, 29 U. S. C. § 206 (d), may be raised in a § 1985 (3) suit. *Hodgin* v. *Jefferson*, 447 F. Supp. 804, 808 (Md. 1978). See also *Murphy* v. *Operating Engineers, Local 18*, 99 LRRM 2074, 2124–2126 (ND Ohio 1978) (conspiracy to violate Labor-Management Reporting and Disclosure Act cognizable under § 1985 (3)); *Local No. 1, ACA* v. *International Brotherhood of Teamsters*, 419 F. Supp. 263, 276 (ED Pa. 1976) (same). I would take advantage of the present opportunity to make clear that this Civil War Era statute was intended to provide a remedy *only* for conspiracies to violate fundamental rights derived from the Constitution.

merely provides a remedy for certain violations of certain federal rights,[1] and today the Court unequivocally holds that § 1985 (3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Ante*, at 372.[2]

Somewhat different language was used by Congress in describing the substantive rights encompassed within the two provisions: § 1 of the 1871 Act, the predecessor to § 1983, referred to "rights, privileges, or immunities secured by the Constitution of the United States," whereas § 2, the predecessor to § 1985 (3), referred to "equal protection of the laws" and "equal privileges and immunities under the laws." [3] The

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[1] "Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all." *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 618.

In that opinion we quoted Senator Edmunds' comment in the 1871 debate:

"All civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy." Cong. Globe, 42d Cong., 1st Sess., 568 (1871).

[2] And *ante*, at 376, the Court states:

"Section 1985 (3), by contrast, *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section."

[3] In its present form, 42 U. S. C. § 1983 refers to deprivations of "rights, privileges, or immunities secured by the Constitution and laws." The "and laws" language was not included in the original statute enacted in 1871, however; it was added in 1874 when Congress enacted the Revised Statutes of the United States. Rev. Stat. § 1979. No similar change was ever made in § 2 of the 1871 Act, the predecessor to § 1985 (3). As originally introduced, that section did provide for criminal and civil actions for deprivations of "rights, privileges, or immunities . . . under the Constitution *and laws* of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (emphasis added). "The enormous sweep of the

import of the language, however, as well as the relevant legislative history, suggests that the Congress which enacted both provisions was concerned with providing federal remedies for deprivations of rights protected by the Constitution and, in particular, the newly ratified Fourteenth Amendment. If a violation was effected "under color of any law, statute, ordinance, regulation, custom, or usage of any State," § 1983 afforded redress; if a violation was caused by private persons who "conspire or go in disguise on the highway," § 1985 (3) afforded redress. Thus, the former authorized a remedy for state action depriving an individual of his constitutional rights, the latter for private action.

Some privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action, as well as impairment by state action. Private conspiracies to deprive individuals of these rights are, as this Court held in *Griffin* v. *Breckenridge*, 403 U. S. 88, actionable under § 1985 (3) without regard to any state involvement.[4]

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original language led to pressures for amendment," *Griffin* v. *Breckenridge*, 403 U. S. 88, 100, and the present language was substituted. The criminal provisions of § 2 were later declared unconstitutional, *United States* v. *Harris*, 106 U. S. 629, and repealed by Congress. 35 Stat. 1088, 1154. This criminal provision should be distinguished from 18 U. S. C. § 241, relied upon by MR. JUSTICE WHITE, see *post*, at 389 n. 5. Section 241 has, since its enactment in 1870, referred explicitly to "the Constitution *or laws* of the United States." See 16 Stat. 141 (emphasis added).

[4] In *Griffin*, *supra*, at 105, the Court quoted the statement from the *Civil Rights Cases*, 109 U. S. 3, 20, that the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." The opinion added:

"We can only conclude that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially

Other privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action. *Shelley* v. *Kraemer*, 334 U. S. 1, 13. If a state agency arbitrarily refuses to serve a class of persons—Chinese-Americans, for example, see *Yick Wo* v. *Hopkins*, 118 U. S. 356—it violates the Fourteenth Amendment. Or if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985 (3).[5]

If, however, private persons engage in purely private acts of discrimination—for example, if they discriminate against women or against lawyers with a criminal practice, see *Dombrowski* v. *Dowling*, 459 F. 2d 190, 194–196—they do not violate the Equal Protection Clause of the Fourteenth Amendment.[6] The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal or unfair treatment by the State, not by private parties. Thus, while § 1985 (3) does not require that a defendant act under color of state law, there still

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discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." 403 U. S., at 105.

With respect to the right of interstate travel, the opinion added:

"Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertible against private as well as governmental interference." *Ibid.*

[5] I have paraphrased the statutory language "preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws" because that language sheds important light on the meaning of the entire section.

[6] As the Court stated in *Shelley* v. *Kraemer*, 334 U. S. 1, 13, the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."

can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation.

Here, there is no claim of such a violation. Private discrimination on the basis of sex is not prohibited by the Constitution. The right to be free of sex discrimination by other private parties is a statutory right that was created almost a century after § 1985 (3) was enacted. Because I do not believe that statute was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not yet been enacted—I agree with the Court's conclusion that it does not provide respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex.[7]

With this additional explanation of my views, I join the Court's opinion.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court today releases employers acting with invidious discriminatory animus in concert with others from liability under 42 U. S. C. § 1985 (3) (1976 ed., Supp. II) for the in-

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[7] Unlike the problem presented by *Runyon* v. *McCrary*, 427 U. S. 160, where I concluded that it was my duty to follow decisions of this Court which in my judgment had erroneously construed the actual intent of Congress, this is a case in which I am free to respect my understanding of congressional intent. To do so does not require me to advocate overruling any prior decisions of this Court in favor of a position which would appear to be "a significant step backwards . . . clearly contrary to my understanding of the mores of today." *Id.*, at 191–192 (STEVENS, J., concurring). And with respect to the issue which is presented in this case, there is no doubt in my mind that the construction of the statute adopted by the Court of Appeals "would have amazed the legislators who voted for it." *Id.*, at 89.

juries they inflict. Because for both respondent in this case and as a general matter § 1985 (3) is an entirely consistent supplement to Title VII, I dissent.

I

Respondent sought compensatory damages under § 1985 (3) [1] on the ground that he had been injured by acts done in furtherance of a conspiracy for the purpose of depriving others of "equal privileges and immunities" guaranteed in § 703 (a) of Title VII,[2] which prohibits discrimination on the basis of, *inter alia*, sex. Additionally, and separately, respondent sought relief under Title VII itself on the ground that he had been deprived of his right under § 704 (a) of Title VII [3] not to be discriminated against because he assisted

[1] Title 42 U. S. C. § 1985 (3) (1976 ed., Supp. II) provides in relevant part that when persons who "conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury . . . , against any one or more of the conspirators."

[2] 42 U. S. C. § 2000e–2 (a). This statute provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3] 42 U. S. C. § 2000e–3 (a). This statute provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor orga-

others in asserting their Title VII rights. Petitioners have not sought review of the Court of Appeals' holding that respondent had stated a cause of action under § 704 (a), and, accordingly, the Court does not address that issue. However, the majority holds that the claim under § 1985 (3) must be dismissed because "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985 (3)," *ante,* at 378.

Unfortunately, the majority does not explain whether the "right created by Title VII" to which it refers is the right guaranteed to women employees under § 703 (a) or the right guaranteed to respondent under § 704 (a). Although in stating its view of the issue before the Court, the majority intimates that it is relying on the fact that respondent has a claim directly under § 704 (a),[4] the reasoning of the majority opinion in no way indicates why the existence of a § 704 (a) claim should prevent respondent from seeking to vindicate under § 1985 (3) the entirely separate right provided by § 703 (a).

Clearly, respondent's right under § 704 (a)—to be free from retaliation for efforts to aid others asserting Title VII rights—is distinct from the Title VII right implicated in his claim under § 1985 (3), which is the right of women employees not to be discriminated against on the basis of their sex. More-

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nization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

[4] See *ante,* at 372 ("The primary question in the present case, therefore, is whether a person injured by a conspiracy to violate § 704 (a) of Title VII of the Civil Rights Act of 1964 is deprived of 'the equal protection of the laws, or of equal privileges and immunities under the laws' within the meaning of § 1985 (3)"). See also *ante,* at 377 ("The only question here, therefore, is whether [the right Novotny claims under § 704 (a)] may be asserted within the remedial framework of § 1985 (3)"). (Emphasis deleted.)

over, that respondent in this case is in a position to assert claims under both § 1985 (3) and § 704 (a) is due solely to the peculiar facts of this case, rather than to any necessary relationship between the two provisions. First, it is of course possible that a person could be injured in the course of a conspiracy to deny § 703 (a) rights—as respondent claims under his § 1985 (3) cause of action—by some means other than retaliatory discrimination prohibited under § 704 (a). Second, § 704 (a) itself protects only employees and applicants for employment; others, such as customers or suppliers, retaliated against in the course of a conspiracy to violate § 703 (a) are not expressly protected under any provision of Title VII. Indeed, if respondent in this case had been only a director, rather than both a director and an employee, of the Great American Federal Savings and Loan Association, he apparently would not be able to assert a claim under § 704 (a).

Because the existence of a § 704 (a) claim is due entirely to the peculiar facts of this case, I interpret the majority's broad holding that "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985 (3)" to preclude respondent from suing under § 1985 (3) not because he coincidentally has a § 704 (a) claim, but because the purpose of the conspiracy allegedly resulting in injury to him was to deny § 703 (a) rights.

II

The pervasive and essential flaw in the majority's approach to reconciliation of § 1985 (3) and Title VII proceeds from its characterization of the former statute as solely a "remedial" provision. It is true that the words "equal privileges and immunities under the laws" in § 1985 (3) refer to substantive rights created or guaranteed by other federal law, be it the Constitution or federal statutes other than § 1985 (3);[5] and

[5] The majority opinion does not reach the issue whether § 1985 (3) encompasses federal statutory rights other than those proceeding in "fundamental" fashion from the Constitution itself. I am not certain in what

in this case it is a conspiracy to deny a substantive right created in § 703 (a) of Title VII [6] that is part of the basis for respondent's suit under § 1985 (3).[7] However, § 1985 (3),

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manner the Court conceives of sex discrimination by private parties to proceed from explicit constitutional guarantees. In any event, I need not pursue this issue because I think it clear that § 1985 (3) encompasses all rights guaranteed in federal statutes as well as rights guaranteed directly by the Constitution. As originally introduced, § 2 of the Civil Rights Act of 1871, 17 Stat. 13, encompassed "rights, privileges, or immunities . . . under the Constitution and laws of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). The substitution of the terms "the equal protection of the laws" and "equal privileges and immunities under the laws," see n. 1, *supra*, did not limit the scope of the rights protected but added a requirement of certain "class-based, invidiously discriminatory animus behind the conspirators' action," *Griffin* v. *Breckenridge*, 403 U. S. 88, 102 (1971). We have repeatedly held that 18 U. S. C. § 241 (derived from § 6 of the Civil Rights Act of 1870, 16 Stat. 141), which is the "closest remaining criminal analogue to § 1985 (3)," *Griffin* v. *Breckenridge*, *supra*, at 98, encompasses all federal statutory rights. See *United States* v. *Waddell*, 112 U. S. 76 (1884); *In re Quarles*, 158 U. S. 532 (1895); *United States* v. *Mosley*, 238 U. S. 383, 387–388 (1915); *United States* v. *Price*, 383 U. S. 787, 800 (1966); *United States* v. *Johnson*, 390 U. S. 563, 565–566 (1968). Similarly, we have stated that 42 U. S. C. § 1983, derived from § 1 of the 1871 Civil Rights Act, encompasses federal statutory as well as constitutional rights. *Edelman* v. *Jordan*, 415 U. S. 651, 675 (1974); *Rosado* v. *Wyman*, 397 U. S. 397 (1970). See generally *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 646 (1979) (WHITE, J., concurring in judgment).

[6] Although *Griffin* v. *Breckenridge*, *supra*, at 102 n. 9, did not reach the issue whether discrimination on a basis other than race may be vindicated under § 1985 (3), the Court correctly assumes that the answer to this question is "Yes." The statute broadly refers to all privileges and immunities, without any limitation as to the class of persons to whom these rights may be granted. It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985 (3), see *infra*, at 392. See generally *Califano* v. *Goldfarb*, 430 U. S. 199 (1977); *Reed* v. *Reed*, 404 U. S. 71 (1971); *Mathews* v. *Lucas*, 427 U. S. 495, 506 (1976).

[7] This is analogous to *United States* v. *Johnson*, *supra*, where the basis for a prosecution under 18 U. S. C. § 241 was a conspiracy to deny the substantive right to equality in public accommodations guaranteed under Title II of the Civil Rights Act of 1964, 42 U. S. C. § 2000a.

unlike a remedial statute such as 42 U. S. C. § 1983,[8] does not merely provide a cause of action for persons deprived of rights elsewhere guaranteed. Because § 1985 (3) provides a remedy for *any person* injured as a result of deprivation of a substantive federal right, it must be seen as itself creating rights in persons other than those to whom the underlying federal right extends.

In this case, for instance, respondent is seeking to redress an injury inflicted upon *him*, which injury is distinct and separate from the injury inflicted upon the female employees whose § 703 (a) rights were allegedly denied. The damages available to a person such as respondent suing under § 1985 (3) are not dependent upon the amount of injury caused persons deprived of "equal privileges and immunities under the laws," but upon the gravity of the separate injury inflicted upon the person suing. Cf. *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 254–255 (1969) (Harlan, J., dissenting).

In this circumstance—where the § 1985 (3) plaintiff is seeking redress for injury caused as a result of the denial of other persons' Title VII rights—it makes no sense to hold that the remedies provided in Title VII are exclusive, for such a § 1985 (3) plaintiff has no Title VII remedy.[9] It thus can hardly be asserted that allowing this § 1985 (3) plaintiff to seek redress of his injury would allow such individual to "completely bypass" the administrative and other "detailed and specific" enforcement mechanisms provided in Title VII, *ante*, at 375–376.

In enacting § 1985 (3), Congress specifically contemplated that persons injured by private conspiracies to deny the fed-

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[8] See *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S., at 602; *id.*, at 623 (POWELL, J., concurring); *id.*, at 646 (WHITE, J., concurring in judgment); *id.*, at 672 (STEWART, J., dissenting).

[9] Section 706 (b) of Title VII, 42 U. S. C. § 2000e–5 (b), contemplates suit only "on or behalf of . . . person[s] . . . aggrieved" under § 703 or § 704.

eral rights of others could redress their injuries, quite apart from any redress by those who are the object of the conspiracy. *Griffin* v. *Breckenridge*, 403 U. S. 88, 103 (1971). Nothing in the Court's opinion suggests any warrant for refusal to recognize this cause of action simply because Title VII rights are involved.

III

I am also convinced that persons whose own Title VII rights have allegedly been violated retain the separate right to seek redress under § 1985 (3). In seeking to accommodate the civil rights statutes enacted in the decade after the Civil War and the civil rights statutes of the recent era, the Court has recognized that the later statutes cannot be said to have impliedly repealed the earlier unless there is an irreconcilable conflict between them. *Runyon* v. *McCrary*, 427 U. S. 160, 173 n. 10 (1976). See *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 457–461 (1975); *Sullivan* v. *Little Hunting Park, supra*, at 237–238. Cf. *United States* v. *Johnson*, 390 U. S. 563 (1968). Of course, the mere fact of overlap in modes of redressing discrimination does not constitute such irreconcilable conflict. See, *e. g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968), and cases cited above. Indeed, we have embraced the notion of an implied repeal only when "[i]t would require the suspension of disbelief to ascribe to Congress the design" to allow vindication under a Reconstruction statute of a right also subject to redress under one of the modern Civil Rights Acts. *Brown* v. *GSA*, 425 U. S. 820, 833 (1976).

It is clear that such overlap as may exist between Title VII and § 1985 (3) occurs only because the latter is directed at a discrete and particularly disfavored form of discrimination, and examination of § 1985 (3) shows that it constitutes a compatible and important supplement to the more general prohibition and remedy provided in Title VII. Thus, while it may be that in many cases persons seeking redress under

§ 1985 (3) also have a claim directly under Title VII,[10] this is not sufficient reason to deprive those persons of the right to sue for the compensatory and punitive damages to which they are entitled under the post-Civil War statute.[11]

As previously indicated, the majority's willingness to infer a silent repeal of § 1985 (3) is based on its view that the provision only gives a remedy to redress deprivations prohibited by other federal law. But this narrow view of § 1985 (3) is incorrect even as to § 1985 (3) plaintiffs themselves denied Title VII rights. Because only conspiracies to deprive persons of federal rights are subject to redress under § 1985 (3), that statute, like 18 U. S. C. § 241,[12] is itself a prohibition separate and apart from the prohibitions stated in the underlying provisions of federal law. Moreover, only those deprivations imbued with "invidiously discriminatory motivation" amounting to "class-based . . . animus," *Griffin* v. *Breckenridge, supra,* at 102, are encompassed by § 1985 (3). Viewed in this manner, the right guaranteed by § 1985 (3) is the right not to be subjected to an invidious conspiracy to deny other federal rights. This discrete category of deprivations to which § 1985 (3) is directed stands in sharp contrast to the broad prohibition on discrimination provided in § 703 (a) of Title VII, see n. 2, *supra; Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971). If, as the majority suggests, it would not recognize an implied repeal of an earlier statute granting a separate but overlapping right, then it should not do so in this case; for respondent has alleged a violation of § 703 (a) in a manner independently prohibited by § 1985 (3), and under the

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[10] It is, of course, theoretically possible that an individual could be injured by a conspiracy to violate his Title VII rights even though that conspiracy was never brought to fruition and thus there was no violation of Title VII itself.

[11] Title VII authorizes only equitable relief, including backpay for a period not to exceed two years. See § 706 (g), 42 U. S. C. § 2000e–5 (g).

[12] See nn. 5, 7, *supra.*

majority's approach should be allowed to redress *both* deprivations.

Even to the extent that § 1985 (3) is properly characterized as a "remedial" statute, there is no reason for holding it inapplicable to redress deprivations of Title VII rights. The majority's apparent assumption that this Court has greater freedom in inferring repeal of remedial statutes than it does of statutes guaranteeing substantive rights has no support in our previous cases. The one instance in which we held Title VII's remedies to be exclusive, *Brown* v. *GSA, supra,* was required because of the unmistakable legislative intent that alternative modes of redress were not to be available for a grievance relating to discrimination in federal employment.[13] Nor has the majority's right/remedy distinction been enunciated in any of our cases recognizing that Congress did not intend Title VII to pre-empt all "alternative means to redress individual grievances," *Runyon* v. *McCrary, supra,* at 174 n. 11, quoting 118 Cong. Rec. 3371 (1972) (Sen. Wil-

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[13] The Court asserts, *ante,* at 378, that its holding is required for "the same basic reasons that underlay the Court's decision in *Brown* v. *GSA,*" as reinforced by the consideration that § 1985 (3) is assertedly purely remedial. But the majority opinion utterly fails to explain in what way the basis for the decision in *Brown*—clear congressional intent—is applicable in this case. *Brown* concerned the peculiar legislative context in which the extension of Title VII to federal employment was enacted, stressing that Congress was under the impression that there was at that time (1972) no other effective judicial remedy for federal discriminatory action. By contrast, this case concerns private discrimination which, of course, has been encompassed by Title VII since the original enactment of the Civil Rights Act in 1964. *Brown* expressly reaffirmed the conclusion of our previous cases that with respect to private employment, "the explicit legislative history of the 1964 Act . . . 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes,' " *Brown* v. *GSA,* 425 U. S., at 833, quoting *Johnson* v. *Railway Express Agency,* 421 U. S. 454, 459 (1975); *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 48 (1974).

liams).[14] With respect to remedies as well as with respect to substantive rights, an implied repeal of post-Civil War civil rights legislation occurs only when the legislative scheme of the new statute is incompatible with the old.

In this case, Title VII and the remedial aspect of § 1985 (3) are entirely consistent, the latter clearly supplementing the former. Title VII operates both to create new federal rights and to provide a general remedy for the denial thereof, while § 1985 (3) operates to provide a separate remedy when the manner of denial is especially invidious and threatening.[15] The Reconstruction Congress that enacted § 1985 (3) believed that an especial danger was posed by persons acting with invidious animus and acting in concert—thereby compounding their power and resources[16]—to deny federal rights. Because such private conspiratorial action, the paradigm of which was the activity of the Ku Klux Klan, constituted a serious threat to civil rights and civil order,[17] it was deemed necessary to "giv[e] a civil action to anybody who shall be injured by [such] conspiracy."[18] Thus, though it may be that those

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[14] See cases cited in n. 13, *supra; Runyon* v. *McCrary*, 427 U. S., at 174–175.

[15] Because § 1985 (3) refers to all federal rights, it is irrelevant that the particular right sought to be vindicated thereunder was not in existence at the time the cause of action was enacted. Cf. *Hagans* v. *Lavine*, 415 U. S. 528 (1974); *Rosado* v. *Wyman*, 397 U. S. 397 (1970) (cause of action under § 1983 to vindicate right under subsequently enacted statute); *United States* v. *Johnson*, 390 U. S. 563 (1968) (prosecution under 18 U. S. C. § 241 for violation of subsequently enacted statute); see also *United States* v. *Waddell*, 112 U. S. 76 (1884).

[16] Cf. *Callanan* v. *United States*, 364 U. S. 587, 593–594 (1961); *Krulewitch* v. *United States*, 336 U. S. 440, 448–449 (1949) (Jackson, J., concurring); *Pinkerton* v. *United States*, 328 U. S. 640, 654 (1946).

[17] See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 665, and n. 11 (1978); *Griffin* v. *Breckenridge*, 403 U. S., at 99–102.

[18] Cong. Globe, 42d Cong., 1st Sess., 568 (1871) (Sen. Edmunds). The passage from which this remark is excerpted is also instructive:

"The second section, it will be observed, only provides for the punish-

who conspire with invidious motivation to violate § 703 (a) may in many cases also be reached under Title VII itself, there is no basis for inferring a silent repeal [19] of the legislative judgment that the distinct nature of the deprivation to which § 1985 (3) is directed warrants separate and more complete relief, and, accordingly, the Court has an obligation to honor the terms of that statute.[20]

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ment of a conspiracy. It does not provide for the punishment of any act done in pursuance of the conspiracy, but only a conspiracy to deprive citizens of the United States, in the various ways named, of the rights which the Constitution and the laws of the United States made pursuant to it give to them; that is to say, conspiracies to overthrow the Government, conspiracies to impede the course of justice, conspiracies to deprive people of the equal protection of the laws, whatever those laws may be. It does not provide, as I say, for any punishment for any act which these conspirators shall do in furtherance of the conspiracy. It punishes the conspiracy alone, leaving the States, if they see fit, to punish the acts and crimes which may be committed in pursuance of the conspiracy. I confess that I thought myself it was desirable, to make the bill complete, to make it completely logical and completely effective, that a section should have been added providing not only for punishing the conspiracy, but providing also in the same way for punishing any act done in pursuance of the conspiracy. This section gives a civil action to anybody who shall be injured by the conspiracy, but does not punish an act done as a crime." *Ibid.*

[19] The majority recognizes that Congress has explicitly noted that Title VII does not pre-empt redress of grievances under 42 U. S. C. § 1981 and 42 U. S. C. § 1983, *ante*, at 377 n. 21. See H. R. Rep. No. 92–238, p. 19 (June 2, 1971); S. Rep. No. 92–415, p. 24 (Oct. 28, 1971). This Court did not resurrect § 1985 (3), *Griffin* v. *Breckenridge*, *supra* (June 7, 1971), from its interment under *Collins* v. *Hardyman*, 341 U. S. 651 (1951), until one week after the House Report was filed; neither Report mentions § 1985 (3), nor does the Senate Report mention *Griffin*.

[20] Petitioners argue that neither the Thirteenth Amendment, the Fourteenth Amendment, nor the Commerce Clause grants Congress authority to reach private conspiracies to deny Title VII rights such as are involved in this case. But petitioners do not dispute that the Commerce Clause is the source of authority for the enactment of Title VII, and Congress needs no additional grant of authority to prohibit, and provide a remedy for, invidious conspiracies to deny such rights.

Because respondent exhausted his administrative remedies under Title VII, see *ante*, at 369, there is no need in this case to reach the question whether persons whose Title VII rights have been violated may bring suit directly in federal court alleging an invidious conspiracy to deny those Title VII rights. I note, however, that the majority's desire not to undercut the administrative enforcement scheme, including the encouragement of voluntary conciliation, provided by Title VII would be completely fulfilled by insisting that § 1985 (3) plaintiffs exhaust whatever Title VII remedies they may have. The concerns expressed in the majority opinion do not provide a basis for precluding redress altogether under § 1985 (3).

Syllabus

SOUTHEASTERN COMMUNITY COLLEGE *v.* DAVIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78–711. Argued April 23, 1979—Decided June 11, 1979

Respondent, who suffers from a serious hearing disability and who seeks to be trained as a registered nurse, was denied admission to the nursing program of petitioner Southeastern Community College, a state institution that receives federal funds. An audiologist's report indicated that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and petitioner rejected respondent's application for admission because it believed her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients. Respondent then filed suit against petitioner in Federal District Court, alleging, *inter alia*, a violation of § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap." The District Court entered judgment in favor of petitioner, confirming the audiologist's findings and concluding that respondent's handicap prevented her from safely performing in both her training program and her proposed profession. On this basis, the court held that respondent was not an "otherwise qualified handicapped individual" protected by § 504 and that the decision to exclude her was not discriminatory within the meaning of § 504. Although not disputing the District Court's factfindings, the Court of Appeals reversed, holding that in light of intervening regulations of the Department of Health, Education, and Welfare (HEW), § 504 required petitioner to reconsider respondent's application for admission without regard to her hearing ability, and that in determining whether respondent was "otherwise qualified," petitioner must confine its inquiry to her "academic and technical qualifications." The Court of Appeals also suggested that § 504 required "affirmative conduct" by petitioner to modify its program to accommodate the disabilities of applicants.

Held: There was no violation of § 504 when petitioner concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 limits the freedom of an educational institution to require reasonable physical qualifications for admission to

a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in petitioner's program would render unreasonable the qualifications it imposed. Pp. 405–414.

(a) The terms of § 504 indicate that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context, but do not mean that a person need not meet legitimate physical requirements in order to be "otherwise qualified." An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. HEW's regulations reinforce, rather than contradict, this conclusion. Pp. 405–407.

(b) Section 504 does not compel petitioner to undertake affirmative action that would dispense with the need for effective oral communication, such as by giving respondent individual supervision whenever she attends patients directly or by dispensing with certain required courses for respondent and training her to perform some but not all of the tasks a registered nurse is licensed to perform. On the record, it appears unlikely that respondent could benefit from any affirmative action that HEW regulations reasonably could be interpreted as requiring with regard to "modifications" of postsecondary educational programs to accommodate handicapped persons and the provision of "auxiliary aids" such as sign-language interpreters. Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. Neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds, and thus even if HEW has attempted to create such an obligation itself, it lacks the authority to do so. Pp. 407–412.

(c) The line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will not always be clear, and situations may arise where a refusal to modify an existing program to accommodate the needs of a disabled person amounts to discrimination against the handicapped. In this case, however, petitioner's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. Uncontroverted testimony established that the purpose of petitioner's program was to train persons who could serve the nursing profession in all customary ways, and this type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial

modifications of standards to accommodate a handicapped person. Pp. 412–413.

574 F. 2d 1158, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Eugene Gressman argued the cause for petitioner. With him on the briefs was *Edward L. Williamson.*

Marc P. Charmatz argued the cause for respondent. With him on the brief were *Seymour DuBow, Philip A. Diehl,* and *Warren L. Pate.**

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*A brief of *amici curiae* urging reversal was filed by the Attorneys General for their respective States as follows: *Francis X. Bellotti* for Massachusetts, *J. Marshall Coleman* for Virginia, *Robert K. Corbin* for Arizona, *Carl R. Ajello* for Connecticut, *Richard S. Gebelein* for Delaware, *Jim Smith* for Florida, *Arthur K. Bolton* for Georgia, *Wayne Minami* for Hawaii, *David H. Leroy* for Idaho, *Theodore L. Sendak* for Indiana, *Tom Miller* for Iowa, *Robert T. Stephan* for Kansas, *William J. Guste, Jr.,* for Louisiana, *Stephen H. Sachs* for Maryland, *A. F. Summer* for Mississippi, *John D. Ashcroft* for Missouri, *Michael T. Greely* for Montana, *Paul L. Douglas* for Nebraska, *Thomas D. Rath* for New Hampshire, *John J. Degnan* for New Jersey, *Robert Abrams* for New York, *Rufus L. Edmisten* for North Carolina, *Allen I. Olson* for North Dakota, *William J. Brown* for Ohio, *Jan Eric Cartwright* for Oklahoma, *James A. Redden* for Oregon, *Daniel R. McLeod* for South Carolina, *William M. Leech, Jr.,* for Tennessee, *Mark White* for Texas, *Slade Gorton* for Washington, *Chauncey H. Browning, Jr.,* for West Virginia, and *Bronson C. LaFollette* for Wisconsin. Briefs of *amici curiae* urging reversal were filed by *Joseph A. Keyes, Jr.,* for the Association of American Medical Colleges; by *Daniel I. Sherry* for the Board of Trustees of Prince George's Community College; by *Susan A. Cahoon, William A. Wright,* and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *Richard A. Fulton* and *David M. Dorsen* for the National Institute for Independent Colleges and Universities et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Days, Brian K. Landsberg, Jessica Dunsay Silver,* and *Vincent F. O'Rourke, Jr.,* for the United States; by *George Deukmejian,* Attorney General, and *Katherine E. Stone* and *G. R. Overton,* Deputy Attorneys General, for the State of California; by *Frank*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a matter of first impression for this Court: Whether § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," forbids professional schools from imposing physical qualifications for admission to their clinical training programs.

I

Respondent, who suffers from a serious hearing disability, seeks to be trained as a registered nurse. During the 1973–1974 academic year she was enrolled in the College Parallel program of Southeastern Community College, a state institution that receives federal funds. Respondent hoped to progress to Southeastern's Associate Degree Nursing program, completion of which would make her eligible for state certification as a registered nurse. In the course of her application to the nursing program, she was interviewed by a member of the nursing faculty. It became apparent that respondent had difficulty understanding questions asked, and on inquiry she acknowledged a history of hearing problems and dependence on a hearing aid. She was advised to consult an audiologist.

J. Laski and *Michael Churchill* for the American Coalition of Citizens with Disabilities et al.; by *Stanley Fleishman* for the California Association for the Physically Handicapped et al.; by *Ann Fagan Ginger* for the Center for Independent Living et al.; by *Douglas L. Parker* for the Institute for Public Representation et al.; and by *John E. Kirklin* for the New York City Council of Organizations Serving the Deaf et al.

Briefs of *amici curiae* were filed by *Edward G. Biester, Jr.*, Attorney General, and *Robert E. Rains, Allen C. Warshaw*, and *J. Justin Blewitt, Jr.*, Deputy Attorneys General, for Pennsylvania; by *John D. Lane* for the American Association for the Advancement of Science et al.; by *Fred Okrand* and *Sam Rosenwein* for the American Civil Liberties Union et al.; by *Sheldon Elliot Steinbach* for the American Council on Education; and by *Elizabeth C. Bunting* for the Board of Governors of the University of North Carolina.

On the basis of an examination at Duke University Medical Center, respondent was diagnosed as having a "bilateral, sensori-neural hearing loss." App. 127a. A change in her hearing aid was recommended, as a result of which it was expected that she would be able to detect sounds "almost as well as a person would who has normal hearing." *Id.*, at 127a–128a. But this improvement would not mean that she could discriminate among sounds sufficiently to understand normal spoken speech. Her lipreading skills would remain necessary for effective communication: "While wearing the hearing aid, she is well aware of gross sounds occurring in the listening environment. However, she can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker." *Id.*, at 128a.

Southeastern next consulted Mary McRee, Executive Director of the North Carolina Board of Nursing. On the basis of the audiologist's report, McRee recommended that respondent not be admitted to the nursing program. In McRee's view, respondent's hearing disability made it unsafe for her to practice as a nurse.[1] In addition, it would be impossible for respondent to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from

[1] McRee also wrote that respondent's hearing disability could preclude her practicing safely in "any setting" allowed by "a license as L[icensed] P[ractical] N[urse]." App. 132a. Respondent contends that inasmuch as she already was licensed as a practical nurse, McRee's opinion was inherently incredible. But the record indicates that respondent had "not worked as a licensed practical nurse except to do a little bit of private duty," *id.*, at 32a, and had not done that for several years before applying to Southeastern. Accordingly, it is at least possible to infer that respondent in fact could not work safely as a practical nurse in spite of her license to do so. In any event, we note the finding of the District Court that "a Licensed Practical Nurse, unlike a Licensed Registered Nurse, operates under constant supervision and is not allowed to perform medical tasks which require a great degree of technical sophistication." 424 F. Supp. 1341, 1342–1343 (EDNC 1976).

realizing the benefits of the program: "To adjust patient learning experiences in keeping with [respondent's] hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs." *Id.*, at 132a–133a.

After respondent was notified that she was not qualified for nursing study because of her hearing disability, she requested reconsideration of the decision. The entire nursing staff of Southeastern was assembled, and McRee again was consulted. McRee repeated her conclusion that on the basis of the available evidence, respondent "has hearing limitations which could interfere with her safely caring for patients." *Id.*, at 139a. Upon further deliberation, the staff voted to deny respondent admission.

Respondent then filed suit in the United States District Court for the Eastern District of North Carolina, alleging both a violation of § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (1976 ed., Supp. III),[2]

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[2] The statute, as set forth in 29 U. S. C. § 794 (1976 ed., Supp. III), provides in full:

"No otherwise qualified handicapped individual in the United States, as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*"

The italicized portion of the section was added by § 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, 92 Stat. 2982. Respondent asserts no claim under this portion of the statute.

and a denial of equal protection and due process. After a bench trial, the District Court entered judgment in favor of Southeastern. 424 F. Supp. 1341 (1976). It confirmed the findings of the audiologist that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and further found:

> "[I]n many situations such as an operation room intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lipreading impossible. Additionally, in many situations a Registered Nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." *Id.*, at 1343.

Accordingly, the court concluded:

> "[Respondent's] handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where [respondent's] particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential of danger to future patients in such situations." *Id.*, at 1345.

Based on these findings, the District Court concluded that respondent was not an "otherwise qualified handicapped individual" protected against discrimination by § 504. In its view, "[o]therwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F. Supp., at 1345. Because respondent's disability would prevent her from functioning "sufficiently" in Southeastern's nursing program, the court

held that the decision to exclude her was not discriminatory within the meaning of § 504.[3]

On appeal, the Court of Appeals for the Fourth Circuit reversed. 574 F. 2d 1158 (1978). It did not dispute the District Court's findings of fact, but held that the court had misconstrued § 504. In light of administrative regulations that had been promulgated while the appeal was pending, see 42 Fed. Reg. 22676 (1977),[4] the appellate court believed that § 504 required Southeastern to "reconsider plaintiff's application for admission to the nursing program without regard to her hearing ability." 574 F. 2d, at 1160. It concluded that the District Court had erred in taking respondent's handicap into account in determining whether she was "otherwise qualified" for the program, rather than confining its inquiry to her "academic and technical qualifications." *Id.*, at 1161. The Court of Appeals also suggested that § 504 required "affirmative conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive." 574 F. 2d, at 1162.

Because of the importance of this issue to the many institutions covered by § 504, we granted certiorari. 439 U. S. 1065 (1979). We now reverse.[5]

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[3] The District Court also dismissed respondent's constitutional claims. The Court of Appeals affirmed that portion of the order, and respondent has not sought review of this ruling.

[4] Relying on the plain language of the Act, the Department of Health, Education, and Welfare (HEW) at first did not promulgate any regulations to implement § 504. In a subsequent suit against HEW, however, the United States District Court for the District of Columbia held that Congress had intended regulations to be issued and ordered HEW to do so. *Cherry* v. *Mathews*, 419 F. Supp. 922 (1976). The ensuing regulations currently are embodied in 45 CFR pt. 84 (1978).

[5] In addition to challenging the construction of § 504 by the Court of Appeals, Southeastern also contends that respondent cannot seek judicial relief for violations of that statute in view of the absence of any express private right of action. Respondent asserts that whether or not § 504

II

As previously noted, this is the first case in which this Court has been called upon to interpret § 504. It is elementary that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring); see *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U. S. 322, 330 (1978); *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 472 (1977). Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.[6]

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provides a private action, she may maintain her suit under 42 U. S. C. § 1983. In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them. See *Norton* v. *Mathews*, 427 U. S. 524, 529–531 (1976); *Moor* v. *County of Alameda*, 411 U. S. 693, 715 (1973); *United States* v. *Augenblick*, 393 U. S. 348, 351–352 (1969).

[6] The Act defines "handcapped individual" as follows:

"The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." § 7 (6) of the Rehabilitation Act of 1973, 87 Stat. 361, as amended, 88 Stat. 1619, 89 Stat. 2–5, 29 U. S. C. § 706 (6).

This definition comports with our understanding of § 504. A person who

The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. See 574 F. 2d, at 1160. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.

The regulations promulgated by the Department of HEW to interpret § 504 reinforce, rather than contradict, this conclusion. According to these regulations, a "[q]ualified handicapped person" is, "[w]ith respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity . . . ." 45 CFR § 84.3 (k)(3) (1978). An explanatory note states:

> "The term 'technical standards' refers to *all* nonacademic admissions criteria that are essential to participation in the program in question." 45 CFR pt. 84, App. A, p. 405 (1978) (emphasis supplied).

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has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by § 504 a range of individuals who could be "otherwise qualified." See S. Rep. No. 93-1297, pp. 38-39 (1974).

A further note emphasizes that legitimate physical qualifications may be essential to participation in particular programs.[7] We think it clear, therefore, that HEW interprets the "other" qualifications which a handicapped person may be required to meet as including necessary physical qualifications.

III

The remaining question is whether the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program. It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program. As the District Court found, this ability also is indispensable for many of the functions that a registered nurse performs.

Respondent contends nevertheless that § 504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication. First, it is suggested that respondent can be given individual supervision by faculty members whenever she attends patients directly. Moreover, certain required courses might be dispensed with altogether for respondent. It is not

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[7] The note states:

"Paragraph (k) of § 84.3 defines the term 'qualified handicapped person.' Throughout the regulation, this term is used instead of the statutory term 'otherwise qualified handicapped person.' The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms 'qualified' and 'otherwise qualified' are intended to be interchangeable." 45 CFR pt. 84, App. A, p. 405 (1978).

necessary, she argues, that Southeastern train her to undertake all the tasks a registered nurse is licensed to perform. Rather, it is sufficient to make § 504 applicable if respondent might be able to perform satisfactorily some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.[8]

Respondent finds support for this argument in portions of the HEW regulations discussed above. In particular, a provision applicable to postsecondary educational programs requires covered institutions to make "modifications" in their programs to accommodate handicapped persons, and to provide "auxiliary aids" such as sign-language interpreters.[9] Respondent

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[8] The court below adopted a portion of this argument:

"[Respondent's] ability to read lips aids her in overcoming her hearing disability; however, it was argued that in certain situations such as in an operating room environment where surgical masks are used, this ability would be unavailing to her.

"Be that as it may, in the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly [respondent] could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities.

"If [respondent] meets all the other criteria for admission in the pursuit of her RN career, under the relevant North Carolina statutes, N. C. Gen. Stat. §§ 90–158, *et seq.*, it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." 574 F. 2d 1158, 1161 n. 6 (1978).

[9] This regulation provides:

"(a) *Academic requirements.* A recipient [of federal funds] to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific

argues that this regulation imposes an obligation to ensure full participation in covered programs by handicapped individuals and, in particular, requires Southeastern to make the kind of adjustments that would be necessary to permit her safe participation in the nursing program.

We note first that on the present record it appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring. Section 84.44 (d)(2), for example, explicitly excludes "devices or services of a personal nature" from the kinds of auxiliary aids a school must provide a handicapped individual. Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program. See 424 F. Supp., at 1346. Furthermore, it also is reasonably clear that § 84.44 (a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program. In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could

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courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

. . . . .

"(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

"(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature." 45 CFR § 84.44 (1978).

allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.

The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. Section 501 (b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals . . . ." These plans "shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met." Similarly, § 503 (a), governing hiring by federal contractors, requires employers to "take affirmative action to employ and advance in employment qualified handicapped individuals . . . ." The President is required to promulgate regulations to enforce this section.

Under § 501 (c) of the Act, by contrast, state agencies such as Southeastern are only "encourage[d] . . . to adopt and implement such policies and procedures." Section 504 does not refer at all to affirmative action, and except as it applies to

federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.[10]

Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Teamsters* v. *Daniel*, 439 U. S. 551, 566 n. 20 (1979). Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.[11] Accordingly, we hold that even if

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[10] Section 115 (a) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 added to the 1973 Act a section authorizing grants to state units for the purpose of providing "such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this Act, particularly the requirements of section 504." 92 Stat. 2971, 29 U. S. C. § 775 (a) (1976 ed., Supp. III). This provision recognizes that on occasion the elimination of discrimination might involve some costs; it does not imply that the refusal to undertake substantial changes in a program by itself constitutes discrimination. Whatever effect the availability of these funds might have on ascertaining the existence of discrimination in some future case, no such funds were available to Southeastern at the time respondent sought admission to its nursing program.

[11] The Government, in a brief *amicus curiae* in support of respondent, cites a Report of the Senate Committee on Labor and Public Welfare on the 1974 amendments to the 1973 Act and several statements by individual Members of Congress during debate on the 1978 amendments, some of which indicate a belief that § 504 requires affirmative action. See Brief for United States as *Amicus Curiae* 44–50. But these isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment. *Quern* v. *Mandley*, 436 U. S. 725, 736 n. 10 (1978); *Los Angeles Dept. of*

HEW has attempted to create such an obligation itself, it lacks the authority to do so.

IV

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a

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Water & Power v. *Manhart*, 435 U. S. 702, 714 (1978). Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent "legislation" such as this Court might weigh in construing the meaning of an earlier enactment. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969).

The Government also argues that various amendments to the 1973 Act contained in the Rehabilitation Act Amendments of 1978 further reflect Congress' approval of the affirmative-action obligation created by HEW's regulations. But the amendment most directly on point undercuts this position. In amending § 504, Congress both extended that section's prohibition of discrimination to "any program or activity conducted by any Executive agency or by the United States Postal Service" and authorized administrative regulations to implement only *this amendment*. See n. 2, *supra*. The fact that no other regulations were mentioned supports an inference that no others were approved.

Finally, we note that the assertion by HEW of the authority to promulgate any regulations under § 504 has been neither consistent nor long-standing. For the first three years after the section was enacted, HEW maintained the position that Congress had not intended any regulations to be issued. It altered its stand only after having been enjoined to do so. See n. 4, *supra*. This fact substantially diminishes the deference to be given to HEW's present interpretation of the statute. See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976).

refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. See, *e. g.*, App. 35a, 52a, 53a, 71a, 74a. This type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.[12]

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[12] Respondent contends that it is unclear whether North Carolina law requires a registered nurse to be capable of performing all functions open to that profession in order to obtain a license to practice, although McRee, the Executive Director of the State Board of Nursing, had informed Southeastern that the law did so require. See App. 138a–139a. Respondent further argues that even if she is not capable of meeting North Carolina's present licensing requirements, she still might succeed in obtaining a license in another jurisdiction.

Respondent's argument misses the point. Southeastern's program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy, and is accepted by the State. In effect, it seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast. Even if the licensing requirements of North Carolina or some other State are less demanding, nothing in the Act requires an educational institution to lower its standards.

One may admire respondent's desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify. In this case, however, we hold that there was no violation of § 504 when Southeastern concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.

V

Accordingly, we reverse the judgment of the court below, and remand for proceedings consistent with this opinion.

So ordered.

Syllabus

MOORE ET AL. *v.* SIMS ET UX.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 78–6. Argued February 26, 1979—Decided June 11, 1979

When school authorities reported suspected abuse of one of adult appellees' children to the Texas Department of Human Resources (Department), the Department took temporary custody of all three of appellees' minor children and instituted suit in the Harris County, Tex., Juvenile Court for their emergency protection under Title 2 of the Texas Family Code. The Juvenile Court entered an emergency *ex parte* order giving temporary custody to the Department. Appellees then filed a motion to modify the *ex parte* order, but when they were unable to obtain an immediate hearing, they filed a habeas corpus petition in Harris County rather than renewing the motion or appealing the *ex parte* order. The Harris County court ultimately entered an order transferring venue to the Montgomery County Juvenile Court, and at the Harris County judge's direction the Department filed another suit, which was also transferred to Montgomery County, while temporary custody of the children was continued in the Department. Rather than attempting to expedite a hearing in the Montgomery County court, appellees filed an action in Federal District Court, broadly challenging the constitutionality of the interrelated parts of Title 2's statutory scheme defining the contours of the parent-child relationship and the permissible areas and modes of state intervention. The District Court denied appellees a temporary restraining order, but later held that the state court's temporary orders had expired and that the children had to be returned to their parents. The Department then filed a new suit in the Montgomery County court, which issued a show-cause order and writ of attachment ordering that the child suspected of being abused be delivered to the temporary custody of his grandparents. Appellees countered by filing in the Federal District Court a second application for a temporary restraining order addressed to the Montgomery County Juvenile Court and this was granted. A three-judge District Court thereafter preliminarily enjoined the Department and other defendants from filing or prosecuting any state suit under the challenged state statutes until a final determination by the three-judge court. Subsequently, this determination was made, the court concluding that abstention under the doctrine of *Younger* v. *Harris*, 401 U. S. 37, was unwarranted because the litigation was "multi-

faceted," involved custody of children, and was the product of procedural confusion in the state courts, and thereafter addressing the merits of the constitutional challenges.

Held: In light of the pending state proceedings, the Federal District Court should not have exercised its jurisdiction but should have abstained under the doctrine of *Younger* v. *Harris, supra,* which, in counseling federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. Pp. 423–435.

(a) The basic concern—the threat to our federal system posed by displacement of state courts by those of the National Government—is applicable not only to state criminal proceedings but also to civil proceedings in which important state interests are involved. *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592. As was the case in *Huffman,* the State here was a party to the state proceedings, and the temporary removal of a child in the child-abuse context is, like the public nuisance statute involved in *Huffman,* "in aid of and closely related to criminal statutes." *Id.,* at 604. P. 423.

(b) While the District Court's reference to the litigation as being "multifaceted" as a reason for refusing abstention is unclear, it appears that this reference meant either that the appellees' constitutional challenge could not have been raised in the pending state proceedings, or that, in view of the breadth of such challenge, abstention was inappropriate. However, with respect to the pertinent inquiry whether the state proceedings afford an adequate opportunity to raise the constitutional claims, Texas law appears to raise no procedural barriers. And the breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it. Pp. 424–428.

(c) There are three distinct considerations that counsel abstention when broad-based challenges are made to state statutes. First is the concern of *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, that a federal court will be forced to interpret state law without the benefit of state-court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time, such dangers increasing with the breadth of the challenge. Second is the need for a concrete case or controversy, a concern also enhanced by the scope of the challenge and one that is demonstrated by the instant case. The third concern is the threat to our federal system of government posed by "the needless obstruction to the domestic policy of the states

by forestalling state action in construing and applying its own statutes." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 471. Almost every constitutional challenge—and particularly one as far ranging as that involved here—offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. Pp. 428–430.

(d) With respect to appellees' argument that delay in affording them a hearing in state court made *Younger* abstention inappropriate, the federal injunction did in fact address the state proceeding and it was unnecessary to obtain release of the children, as they had already been placed in appellees' custody pursuant to federal-court order. *Gerstein* v. *Pugh*, 420 U. S. 103, distinguished. Furthermore, such argument cannot be distinguished from conventional claims of bad faith and other sources of irreparable harm; in this case the state authorities' conduct evinced no bad faith, and, while there was confusion, confusion is not bad faith. Pp. 430–432.

(e) In the absence of bad faith, there remain only limited grounds for not applying *Younger*. Here, no claim could be properly made that the state proceedings were motivated by a desire to harass or that the challenged statute is "'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph,'" *Huffman*, *supra*, at 611. Nor were there present in this case other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment," *Younger*, *supra*, at 53. Unless it were held that every attachment issued to protect a child creates great, immediate, and irreparable harm warranting federal-court intervention, it cannot be properly concluded that with the state proceedings here in the posture they were at the time of the federal action, federal intervention was warranted. Pp. 432–435.

438 F. Supp. 1179, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 435.

David H. Young, Assistant Attorney General of Texas, argued the cause for appellants. With him on the brief were *John L. Hill*, Attorney General, *David M. Kendall*, First As-

sistant Attorney General, and *Steve Bickerstaff*, *Kathryn A. Reed*, and *Ann Clarke Snell*, Assistant Attorneys General.

Windell E. Cooper Porter argued the cause for appellees. With her on the brief were *Robert L. Byrd* and *Martin J. Grimm*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Title 2 of the Texas Family Code was enacted in 1973 and first went into effect on January 1, 1974. It was amended substantially in the following year. The Title defines the contours of the parent-child relationship and the permissible areas and modes of state intervention. This suit presents the first broad constitutional challenge to interrelated parts of that statutory scheme. It raises novel constitutional questions of the correlative rights and duties of parents, children, and the State in suits affecting the parent-child relationship.

This litigation, involving suspected instances of child abuse, was initiated by state authorities in the Texas state courts in 1976. The state proceedings, however, were enjoined by the three-judge District Court below, which went on to find various parts of Title 2 unconstitutional on their face or as applied. We noted probable jurisdiction. 439 U. S. 925 (1978). This appeal first raises the question whether in light of the pending state proceedings, the Federal District Court should have exercised its jurisdiction. We conclude that it should not have done so and accordingly reverse and remand with instructions that the complaint be dismissed.

I

The appellees in this case, husband and wife and their three minor children, seek a declaration that parts of Title 2 of the

*Briefs of *amici curiae* urging affirmance were filed by *Catherine P. Mitchell* and *Martin A. Schwartz* for Community Action for Legal Services, Inc., et al.; by *Gary R. Thomas*, *Robert B. O'Keefe*, and *Steven D. Ross* for East Texas Legal Services, Inc.; and by *Stefan Rosenzweig* and *Jeanette Ganousis* for Wanda Dixie et al.

Texas Family Code unconstitutionally infringe family integrity.[1] The state-court litigation was precipitated by school authorities who reported to the Texas Department of Human Resources (formerly the State Department of Public Welfare) on March 25, 1976, that a child, Paul Sims, suffered from physical injuries apparently inflicted or aggravated by his father on a visit to the Osborne Elementary School in Houston, Tex. To protect the Sims children and to investigate the extent of any injuries, the Texas Department of Human Resources (hereinafter Department) on the same day took temporary custody of all three Sims children, who were in the school, and had them examined by a physician. The doctor found that the children were battered, and Paul was hospitalized for 11 days.

On the day that it took custody of the children, the Department decided to institute a suit for emergency protection of the children under § 17.02 of the Texas Family Code.[2] The suit was filed in the Harris County Juvenile Court on

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[1] Although it is not clear that the children were nominal parties in all of the proceedings in the state courts, for ease of reference all of those actions will be referred to as actions by the appellees.

[2] Chapter 17 of Title 2 of the Texas Family Code provides for suits for protection of children in emergencies. Section 17.01 states:

"An authorized representative of the State Department of Public Welfare, a law-enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle, whether or not the court has continuing jurisdiction under Section 11.05 of this code. The child shall be delivered immediately to the court." Tex. Fam. Code Ann., Tit. 2, § 17.01 (Supp. 1978–1979).

These emergency seizures are to be followed by hearings provided for in § 17.02 (1975):

"Unless the child is taken into possession pursuant to a temporary order entered by a court under Section 11.11 of this code, the officer or representative shall file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child."

March 26, 1976, the day after the children were removed from the school. Pursuant to § 17.04 of the Texas Code, the Juvenile Court Judge entered an emergency *ex parte* order which gave temporary custody of the children to the Department.[3]

Five days later, the appellees appeared in court and moved to modify the *ex parte* order, the proper procedure for terminating the Department's temporary custody.[4] A hearing on such a motion is required under Texas law, but the Juvenile Court Judge was temporarily unavailable and the court clerk returned the motion to appellees' attorney. Rather than renew the motion or appeal the emergency order, appellees filed a petition for a writ of habeas corpus in the same Harris County court.[5] A hearing on that petition was held on April 5,

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[3] Tex. Fam. Code Ann., Tit. 2, § 1704 (1975):

"On a showing that the child is apparently without support and is dependent on society for protection, or that the child is in immediate danger of physical or emotional injury, the court may make any appropriate order for the care and protection of the child and may appoint a temporary managing conservator for the child."

§ 17.05 (Supp. 1978–1979):

"(a) An order issued under Section 17.04 of this code expires at the end of the 10-day period following the date of the order, on the restoration of the child to the possession of its parent, guardian, or conservator, or on the issuance of ex parte temporary orders in a suit affecting the parent-child relationship under this subtitle, whichever occurs first.

"(b) If the child is not restored to the possession of its parent, guardian, or conservator, the court shall:

"(1) order such restoration or possession; or

"(2) direct the filing of a suit affecting the parent-child relationship in the appropriate court with regard to continuing jurisdiction."

[4] § 17.06 (1975):

"On the motion of a parent, managing conservator, or guardian of the person of the child, and notice to those persons involved in the original emergency hearing, the court shall conduct a hearing and may modify any emergency order made under this chapter if found to be in the best interest of the child."

[5] Emergency orders are apparently appealable under Texas law. See § 17.07 (1975); *In re R. E. W.*, 545 S. W. 2d 573 (Tex. Civ. App. 1976).

1976, and on that date the Juvenile Court Judge concluded that venue was properly in neighboring Montgomery County, where the children were residents, and he transferred the proceedings to that county. See Tex. Fam. Code Ann., Tit. 2, § 11.04 (a) (1975). At the judge's direction, see § 17.05 (b) (2) (Supp. 1978–1979), the Department filed a "Suit Affecting the Parent-Child Relationship" as authorized by § 11.02, which was also transferred to Montgomery County. In addition, the judge issued a temporary restraining order continuing the Department's temporary custody of the children.[6]

The appellees then had actual knowledge that the action had been moved to Montgomery County.[7] There is no indication that any effort was made to expedite the hearing in that county; the appellees did not request an early hearing from state trial or appellate courts. Nor did they appeal the temporary order. See *In re Stuart,* 544 S. W. 2d 821 (Tex. Civ. App. 1976). Instead, on April 19, 1976, they filed this action in the United States District Court for the Southern District of Texas, and thereby initiated two months of procedural maneuvers in both the state and federal courts.

On April 20, a temporary restraining order was denied appellees by the District Court. A hearing on the application for a

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[6] In issuing this temporary order, the Harris County Juvenile Court relied on Tex. Fam. Code Ann., Tit. 2, § 11.11 (1975 and Supp. 1978–1979), which authorizes a court in a suit affecting the parent-child relationship to make "any temporary order for the safety and welfare of the child." The parties in this litigation disagree whether the Juvenile Court Judge had jurisdiction to enter that order. This is one of a number of ambiguous state-law questions in this case. Another is the period for which such a temporary order may remain in effect.

Suits affecting the parent-child relationship are authorized by § 11.02 (1975). These suits are the vehicles by which the State brings about any change in the parent-child relationship.

[7] There is testimony in the record that a hearing had been set in Montgomery County for May 8, 1976. Defendant's Exhibit # 1A, Sworn Statement of Rex Downing 65–66.

preliminary injunction was ultimately set for May 5. When the Department received notice of the federal proceeding on April 22, the pending state proceedings were suspended.

On May 4, however, one day before the scheduled federal hearing, the Simses returned to the state-court system, moving to file an original petition for a writ of habeas corpus in the Texas Court of Civil Appeals. The motion was denied for want of jurisdiction.

The next day, the Federal District Court held that the temporary orders issued by the state court had expired and that the children had to be returned to their parents, although the Department was not enjoined from pursuing a new action in state court. The court noted that it was requesting a three-judge court to consider appellees' constitutional challenge to Title 2. On May 14, the Department did file a new § 11.02 suit in Montgomery County, and the state court issued a show-cause order and writ of attachment ordering that Paul Sims be delivered to the temporary custody of his grandparents. The court set the show-cause hearing for May 21, but the Simses could not be found for purposes of service and the hearing was reset for June 21. The Simses countered by filing in the United States District Court a second application for a temporary restraining order addressed to the Montgomery County Juvenile Court, which was granted on May 21. The three-judge court on June 7 entered a preliminary injunction enjoining the Department and other defendants from filing or prosecuting any state suit under the challenged state statutes until a final determination by the three-judge court. That determination was made on October 12, 1977, and is the subject of this appeal.

After concluding that abstention under the doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971), was unwarranted because the litigation was "multifaceted," involved custody of children, and was the product of procedural confusion in the state courts, the District Court addressed the merits of the due process challenges. It surveyed virtually every aspect of

child-abuse proceedings in Texas. *Sims* v. *State Dept. of Public Welfare*, 438 F. Supp. 1179, 1189–1195. Since we conclude that it should never have embarked on this survey we do not recount it here.

II

Appellants argue that the Federal District Court should have abstained in this case under the principles of *Younger* v. *Harris, supra.* The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. *Samuels* v. *Mackell*, 401 U. S. 66, 69 (1971). That policy was first articulated with reference to state criminal proceedings, but as we recognized in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), the basic concern—that threat to our federal system posed by displacement of state courts by those of the National Government—is also fully applicable to civil proceedings in which important state interests are involved. As was the case in *Huffman*, the State here was a party to the state proceedings, and the temporary removal of a child in a child-abuse context is, like the public nuisance statute involved in *Huffman*, "in aid of and closely related to criminal statutes." *Id.*, at 604. The existence of these conditions, or the presence of such other vital concerns as enforcement of contempt proceedings, *Juidice* v. *Vail*, 430 U. S. 327 (1977), or the vindication of "important state policies such as safeguarding the fiscal integrity of [public assistance] programs," *Trainor* v. *Hernandez*, 431 U. S. 434, 444 (1977), determines the applicability of *Younger-Huffman* principles as a bar to the institution of a later federal action.[8]

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[8] Therefore, contrary to the suggestion of the dissent, we do not remotely suggest "that every pending proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies." *Post*, at 435–436.

In *Huffman*, we noted those well-established circumstances where the federal court need not stay its hand in the face of pending state proceedings.

> "*Younger*, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is ' "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." ' " 420 U. S., at 611.

The District Court, however, did not rely expressly on these established exceptions to the *Younger* doctrine in finding that abstention was inappropriate in this case. Rather, it concluded that *Younger* abstention was not warranted because the action taken by the State of Texas in this case is "multifaceted"; "there is no single state proceeding to which the plaintiffs may look for relief on constitutional or any other grounds." 438 F. Supp., at 1187.

> "Many of the challenged actions taken by the state do not and will not involve any judicial proceeding. Certainly as to these, there is no pending state civil litigation about which even to consider abstention." *Ibid.* (footnote omitted).

The court specifically alluded to the allegations regarding the Child Abuse and Neglect Report and Inquiry System (CANRIS), *id.*, at 1187 n. 5, that is, the appellees' challenge on constitutional grounds to the State's computerized collection and dissemination of child-abuse information where that information is not the product of a judicial determination of abuse or neglect.

The meaning of the District Court's reference to this litigation as "multifaceted" is unclear, but two possible interpreta-

tions suggest themselves. Under established principles of equity, the exercise of equitable powers is inappropriate if there is an adequate remedy at law. See *Douglas* v. *City of Jeannette*, 319 U. S. 157, 164 (1943). Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in the state proceedings." *Juidice* v. *Vail, supra,* at 337 (emphasis in original); see *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973). The pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings. The District Court's reference to the child-abuse reporting system reflects a misunderstanding of the nature of the inquiry. That the Department's suit does not necessarily implicate CANRIS is not determinative. The question is whether that challenge can be raised in the pending state proceedings subject to conventional limits on justiciability. On this point, Texas law is apparently as accommodating as the federal forum.[9] Certainly, abstention is appro-

[9] Section 11.02 (b) of Title 2 provides:

"(b) One or more matters covered by this subtitle may be determined in the suit. The court, on its own motion, may require the parties to replead in order that any issue affecting the parent-child relationship may be determined in the suit." Tex. Fam. Code Ann., Tit. 2, § 11.02 (b) (1975).

As one Texas commentator has noted, § 11.02 (b) vests "a broad range of powers and duties on district courts in cases in which minors appear before the court." Smith, Draftmen's Commentary to Title 2 of the Texas Family Code, 5 Tex. Tech. L. Rev. 389, 393 (1974). He notes that this section adopts the liberal approach to joinder of claims and remedies found in Tex. Rule Civ. Proc. 51. Section 11.14, which describes the hearing in suits affecting the parent-child relationship, fortifies that view. It states: "(a) Except as otherwise provided in this subtitle, proceedings shall be as in civil cases generally."

Texas Rule Civ. Proc. 51 is modeled on Fed. Rule Civ. Proc. 18 and provides in relevant part that "[t]he plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as

priate unless state law clearly bars the interposition of the constitutional claims.

There are also intimations in the District Court's opinion that its decision to exert jurisdiction was influenced by a broader and novel consideration—the breadth of appellees' challenge to Title 2.

> "The entire statutory scheme by which Texas attempts to deal with the problem of child abuse has been challenged and should be viewed as an integrated whole. This court will not consider part of the scheme and abstain from another part. To do so would seriously jeopardize any hope for an effective statutory scheme and, in the name of comity and federalism, do violence to the state functions those principles seek to protect." 438 F. Supp., at 1187.[10]

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many claims either legal or equitable or both as he may have against an opposing party." Thus, Texas procedural law has long encouraged joinder of claims in civil actions. See, *e. g.*, *Texas Gauze Mills* v. *Goatley*, 119 S. W. 2d 887, 888 (Tex. Civ. App. 1938); *Blair* v. *Gay*, 33 Tex. 157, 165 (1870).

In a very recent case, *In re R. E. W.*, 545 S. W. 2d 573 (1976), the Texas Court of Civil Appeals has indicated that under Title 2 the full range of constitutional challenges is cognizable in the emergency-removal proceedings and in suits affecting the parent-child relationship. *Id.*, at 575. Therefore, this is not a case like *Hernandez* v. *Finley*, 471 F. Supp. 516 (ND Ill. 1978), summarily aff'd *sub nom. Quern* v. *Hernandez*, 440 U. S. 951 (1979), where the three-judge court found, after our remand in *Trainor* v. *Hernandez*, 431 U. S. 434 (1977), that the applicable state procedures did not permit the defendant to raise a constitutional challenge.

[10] Thus, we cannot agree with the dissenters' characterization of the claims raised below as being as unrelated as child abuse and traffic violations. As the District Court properly perceived it, this action is a comprehensive attack on an integrated statutory structure best suited to resolution in one forum. Our disagreement with the District Court is with its choice of forum. Likewise, there is little in our case law or sound judicial administration to commend the suggestion that *Younger* should have been invoked with respect to some of the claims in this case and

Thus, the District Court suggests that the more sweeping the challenge the more inappropriate is abstention, and thereby inverts traditional abstention reasoning. The breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it. This is evident in a number of distinct but related lines of abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework.

The earliest abstention cases were rooted in notions of equity. In *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 498 (1941), the Court observed that the dispute before it implicated "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." The Court found the "resources of equity" sufficient to accommodate an adjustment which would avoid "the friction of a premature constitutional adjudication" and obviate the need for a federal court to interpret state law without the benefit of an authoritative interpretation by a state court. *Id.*, at 500. Thus evolved the doctrine of *Pullman* abstention: that a federal action should be stayed pending determination in state court of state-law issues central to

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others should have been left to the federal forum. *Post*, at 443. Given the interrelated nature of the claims, such a bifurcation would result in the duplicative litigation and lack of state-court interpretation of an integrated statutory framework that this Court, in *Trainor* v. *Hernandez*, *supra*, at 445, identified as central concerns underlying the *Younger* doctrine.

The dissenters' additional argument that a constitutional attack on state procedures automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases is reiteration of a theme sounded and rejected in prior cases. See *Trainor* v. *Hernandez*, *supra*, at 469–470 (STEVENS, J., dissenting); *Juidice* v. *Vail*, 430 U. S. 327, 339–340 (1977) (STEVENS, J., concurring in judgment).

the constitutional dispute. Mr. Justice Frankfurter in his opinion for the Court observed:

> "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. . . . Few public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania* v. *Williams*, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159 . . . ." *Ibid.*

There are three distinct considerations that counsel abstention when broad-based challenges are made to state statutes, and it is common to see each figure in an abstention decision; for the broader the challenge, the more evident each consideration becomes. There is first the *Pullman* concern: that a federal court will be forced to interpret state law without the benefit of state-court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless. *Watson* v. *Buck*, 313 U. S. 387, 401–402 (1941); and *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 459–461 (1945). These dangers increase with the breadth of the challenge.

The second consideration is the need for a concrete case or controversy—a concern also obviously enhanced by the scope of the challenge. That is demonstrated by the instant case.

For example, appellees challenge § 11.15 of the Texas Family Code which provides that the standard of proof in any suit affecting the parent-child relationship shall be the "preponderance of the evidence." The District Court held that in any proceeding involving parental rights, the State must bear as a matter of federal constitutional law a burden of "clear and convincing" evidence. Yet no proceeding was pursued in this case to the point where the standard could be applied, and consequently appellees can point to no injury in fact. A second illustration is the challenge to statutorily authorized preseizure investigative procedures: there was apparently no preseizure investigation in this case.[11] *Alabama State Federation of Labor* v. *McAdory, supra,* at 461; *Public Service Comm'n* v. *Wycoff Co.,* 344 U. S. 237, 245–246 (1952).

The final concern prompted by broad facial attacks on state statutes is the threat to our federal system of government posed by "the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Alabama State Federation of Labor* v. *McAdory, supra,* at 471.

> "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman* v. *Pursue, Ltd.,* 420 U. S., at 603.

State courts are the principal expositors of state law. Almost every constitutional challenge—and particularly one as far ranging as that involved in this case—offers the opportunity for narrowing constructions that might obviate the constitu-

[11] The District Court focused on psychiatric examinations, although there is no evidence that there was any examination of this nature administered to the Sims children before or after the temporary removal. *Sims* v. *State Dept. of Public Welfare,* 438 F. Supp. 1179, 1191.

tional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. *Trainor* v. *Hernandez*, 431 U. S., at 445. The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected. *Huffman*, *supra*, at 610–611.

In sum, the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims, and Texas law appears to raise no procedural barriers.[12] Nor do appellees seriously argue to the contrary. Rather, they contend that because they were not granted a hearing at the time that they thought they were entitled to one, there was no practical opportunity to present their federal claims.[13] Thus, the issue as posed by appellees is whether the

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[12] The proposition that claims must be cognizable "as a defense" in the ongoing state proceeding, as put forward by our dissenting Brethren, *post*, at 436–437, converts a doctrine with substantive content into a mere semantical joust. There is no magic in the term "defense" when used in connection with the *Younger* doctrine if the word "defense" is intended to be used as a term of art. We do not here deal with the long-past niceties which distinguished among "defense," "counterclaims," "setoffs," "recoupments," and the like. As we stated in *Juidice* v. *Vail*, 430 U. S., at 337:

"Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention. . . . Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." (Footnotes omitted; emphasis in original.)

[13] In their brief, appellees argue that there was no adequate remedy at state law because their "every effort, to obtain judicial relief in State court was either frustrated or denied." Brief for Appellees 25. During oral argument, counsel for appellees responded to a request for justification of federal-court involvement in this case by stating that appellees did not

conduct of the state judiciary was such that it in fact denied appellees an opportunity to be heard that was theirs in theory. That claim is related to the District Court's second theory why *Younger* abstention was not warranted in this case.

The District Court framed this "second independent basis for the inapplicability of *Younger* principles" as follows:

> "[W]e note that the plaintiffs' constitutional challenge is directed primarily at the legality of the children's seizure and detention for a 42-day period without a hearing. It is clear that because this issue cannot be raised as a defense in the normal course of the pending judicial proceeding, abstention would be inappropriate. *See Gerstein* v. *Pugh,* 420 U. S. 103, 108 n. 9 . . . (1975). The denial of custody of the children pending any hearing regardless of the result of the hearing, is in itself sufficient to prevent the application of *Younger.*" 438 F. Supp., at 1187.

The reliance on *Gerstein* is misplaced. That case involved a challenge to pretrial restraint on the basis of a prosecutor's information alone, without the benefit of a determination of probable cause by a judicial officer. This Court held that the District Court properly found that the action was not barred by *Younger* because the injunction was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves. "The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Gerstein* v. *Pugh,* 420 U. S. 103, 108 n. 9 (1975). Here the injunction did address the state proceeding and it was not necessary to obtain the release of the children, for they had already been placed in the custody of their parents pursuant to a federal-court order. This Court has addressed the *Younger* doctrine on a number of occasions since

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believe that there was a state action pending below. Tr. of Oral Arg. 34. Counsel did not argue that the perceived deficiency in the state proceedings was the product of a procedural bar to appellees' constitutional claims.

Gerstein. In *Juidice* v. *Vail*, 430 U. S., at 336–337, we noted that the teaching of *Gerstein* was that the federal plaintiff must have an opportunity to press his claim in the state courts and, as noted above, the appellees have not shown that state procedural law barred presentation of their claims—in fact Texas law seems clearly to the contrary.

As for the argument that the delay in affording the parents a hearing in state court made *Younger* abstention inappropriate, we cannot distinguish this argument from conventional claims of bad faith and other sources of great, immediate, and irreparable harm if the federal court does not intervene—traditional circumstances where a federal court need not stay its hand. We simply cannot agree that the conduct of the state authorities in this case evinces bad faith; and we do not read the District Court as expressly so finding. That there was confusion is undeniable. It is evident in the uncertainty regarding the effective period of a temporary order under § 11.11 and regarding the propriety of entering that order when venue was in Montgomery County. But confusion is not bad faith, and in this case confusion was the predictable byproduct of a new statutory scheme. The question would be a much closer one had appellees diligently sought a hearing in Montgomery County after the Harris County action was transferred or had they pursued their appellate remedies.

Once it is determined that there is no bad faith, there remain only limited grounds for not applying *Younger*. The District Court did not find, nor could it have found, "harassment." Nor could it credibly be claimed that Title 2 is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Watson* v. *Buck*, 313 U. S., at 402, quoted in *Younger* v. *Harris*, 401 U. S., at 53–54.

The District Court placed some reliance on the observation in *Younger* that there may be other "extraordinary circum-

stances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Id.*, at 53. See *Perez* v. *Ledesma*, 401 U. S. 82, 85 (1971); *Mitchum* v. *Foster*, 407 U. S. 225, 230–231 (1972). The most extensive explanation of those "extraordinary circumstances" that might constitute great, immediate, and irreparable harm is that in *Kugler* v. *Helfant*, 421 U. S. 117 (1975). Although its discussion is with reference to state criminal proceedings, it is fully applicable in this context as well.

> "Only if 'extraordinary circumstances' render the state court incapable of fairly and fully adjudicating the federal issues before it, can there be any relaxation of the deference to be accorded to the state criminal process. The very nature of 'extraordinary circumstances,' of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings. But whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Id.*, at 124–125.

See *Trainor* v. *Hernandez*, 431 U. S., at 442 n. 7.

To gauge whether such extraordinary circumstances exist in this case, we must view the situation at the time the state proceedings were enjoined. On May 21, when the District Court granted a temporary restraining order, and on June 7, when the three-judge court entered a preliminary injunction enjoining appellants from filing or prosecuting any state suit under the challenged state statutes until the District Court had finally determined the questions at issue, the two adult appellees had already successfully obtained possession of their minor children by means of the federal-court order of

May 5. The District Court's order of that date did not enjoin the Department from instituting a new suit in state court, and such a suit was instituted in Montgomery County on May 14. The Montgomery County action was entitled a "Suit Affecting the Parent-Child Relationship," and the Department's petition related the documented child abuse and prayed that a writ of attachment issue to protect the minor child, Paul Sims. The state court issued a writ pursuant to § 11.11 directing that Paul Sims be placed in the temporary custody of his grandparents, appointing a guardian *ad litem*, and setting a hearing to show cause for May 21. The record indicates that appellees absented themselves from home, work, and school, thereby impeding the attachment and service of the show-cause order, and does not indicate that the actual physical custody of Paul Sims was ever surrendered by appellees pursuant to the Montgomery County court writ.

It is in this posture that one must consider the propriety of the District Court's injunction barring further state proceedings. Paul Sims was within the custody of his parents, and a specific date had been set for the show-cause hearing regarding the writ of attachment, at which time the parents could press their objections. Unless we were to hold that every attachment issued to protect a child creates great, immediate, and irreparable harm warranting federal-court intervention, we are hard pressed to conclude that with the state proceedings in this posture federal intervention was warranted.

Perhaps anticipating this logic, the District Court in this case concluded that "[t]he denial of custody of the children pending any hearing regardless of the result of the hearing, is in itself sufficient to prevent the application of *Younger*," 438 F. Supp., at 1187. Presumably, this conclusion was prompted by the District Court's observation that "the constitutional issues raised by the plaintiffs reach the application of due process in an area of the greatest importance to our society, the family." *Ibid.* But the District Court again inverts

traditional abstention logic when it states that because the interests involved are important, abstention is inappropriate. Family relations are a traditional area of state concern. This was recognized by the District Court when it noted the "compelling state interest in quickly and effectively removing the victims of child abuse from their parents." *Id.*, at 1189. We are unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation.[14]

We reverse the judgment of the District Court and remand with instructions that the complaint be dismissed.

It is so ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

Before asking whether any of the recognized exceptions to the doctrine of *Younger* v. *Harris*, 401 U. S. 37, make it appropriate for a federal court to exercise its jurisdiction to pass on the constitutionality of a state statute, the Court should first decide whether there is a legitimate basis for invoking the *Younger* doctrine at all. It has never been suggested that every pending proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to *Younger*

[14] The dissenters' concern that requiring appellees to raise their challenges to the Texas Family Code in the pending proceeding will complicate and delay resolution of the merits of the State's claims would clearly be misplaced if the dissent were correct in its characterization of the bulk of appellees' claims as analogous to "a traffic violation" as far as their relation to the pending state proceeding is concerned. Appellees could simply obtain a resolution of the pending proceeding and then file their separate action. They are certainly not required to pursue "an unwise and impractical course of litigation." *Post*, at 440. Nor is there reason to believe that consolidating all of these claims in federal court or litigating simultaneously in two different courts would prove more expeditious, wise, or practical.

applies; for example, a pending charge that the federal plaintiff is guilty of a traffic violation will not justify dismissal of a federal attack on the constitutionality of the State's child-abuse legislation.

The policy of equitable restraint expressed in *Younger* "is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler* v. *Helfant*, 421 U. S. 117, 124. Since "no citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts," *Younger* v. *Harris, supra*, at 46, there is no justification for intervention by a court of equity to rule on claims which may be raised as a defense to the criminal prosecution and which, if meritorious, will result in adequate relief in that forum. Moreover, in our federal system, intervention by a federal court with respect to the questions at issue in state proceedings carries with it additional costs in terms of comity and federalism, for it "can readily be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 604.

The District Court's conclusion that abstention was inappropriate in this case was based squarely on its finding "that there is for these plaintiffs no 'opportunity to fairly pursue their constitutional claims in an ongoing state proceeding.'" [1] In the absence of such an opportunity, *Younger* is simply inapplicable. Its underlying concerns with comity, equity, and federalism, we have recognized, have little force or vitality where there is no single pending state proceeding in which the constitutional claims may be raised "as a defense" and

[1] *Sims* v. *State Dept. of Public Welfare*, 438 F. Supp. 1179, 1189, quoting *Juidice* v. *Vail*, 430 U. S. 327, 338. A comparable finding by the District Court following this Court's remand in *Trainor* v. *Hernandez*, 431 U. S. 434, led to our unanimous summary affirmance of a holding that *Younger* v. *Harris* did not justify abstention. See *Quern* v. *Hernandez*, 440 U. S. 951.

effective relief secured.[2] "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." *Steffel* v. *Thompson,* 415 U. S. 452, 462. To be sure, it can be argued that whenever a federal court rules on the constitutionality of a state statute, it is making a decision that interferes with the operation of important state mechanisms, and performing a task that could equally be performed by a state court. See *ante,* at 427. But this sort of lesser affront to principles of comity and federalism is not one that justifies a federal court in refusing to exercise the jurisdiction over federal claims that Congress has entrusted to it. As this Court has repeatedly held, if a constitutional violation is alleged, even with respect to the most important state statute, a plaintiff is free to bring his suit in federal court without any requirement that he first exhaust state judicial remedies.[3]

In requiring abstention in this case, the Court, in my judgment, is departing from these well-established principles and extending *Younger* beyond its logical bounds. The Sims parents sought relief in federal court after 42 days of "diligent efforts" to secure a hearing in state court in order to regain custody of their children.[4] Despite their efforts, they not only

[2] See *Steffel* v. *Thompson,* 415 U. S. 452, 462–463; *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 509. See also *Younger* v. *Harris,* 401 U. S., at 46 ("the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution").

[3] See *Monroe* v. *Pape,* 365 U. S. 167, 183; *Steffel* v. *Thompson, supra.* See also *Mitchum* v. *Foster,* 407 U. S. 225; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278.

[4] "The plaintiffs' having sought through diligent efforts an opportunity to be heard in a state proceeding, this court must conclude that whatever opportunities exist for them are not such as to allow them to 'fairly pursue' their constitutional objections." 438 F. Supp., at 1188–1189.

failed to regain custody, but also did not even have an opportunity to be heard in a state court. Their constitutional challenge in federal court was "directed primarily at the legality of the children's seizure and detention for a 42-day period without a hearing" and the statutory scheme which allowed this serious deprivation of liberty to occur.[5]

The only proceeding pending in state court at the time they brought this suit was a "Suit Affecting the Parent-Child Relationship" initiated by the Harris County Welfare Unit on April 5 pursuant to ch. 11 of the Texas Family Code.[6] As of the first hearing in federal court on May 5, the plaintiff-parents had yet to receive notice of this suit, let alone any actual hearing before the judge. Had the federal court not intervened, however, notice would eventually have been provided, assuming compliance with the statute, and an adversary hearing would eventually have taken place. But this does not mean that federal-court abstention was required or appropriate.

In the hearing to be afforded under ch. 11, the state court would be required to decide whether the children should be returned to the custody of their parents or whether their interests would be better served by alternative arrangements for their care. With limited exceptions,[7] the Simses' suit in

[5] *Id.*, at 1187.

[6] *Id.*, at 1185. These proceedings were suspended, apparently voluntarily, by the State on April 22, when the Department of Human Resources received notice of the federal suit. A second ch. 11 suit was later filed by the Department, with respect to Paul Sims alone, on May 14, after suit in federal court had been filed and the first hearing held. Whether that action could in any circumstances serve as a predicate for a *Younger* dismissal is a substantial question which the Court does not purport to address. See *Hicks* v. *Miranda*, 422 U. S. 332.

[7] In addition to their challenges to the practices and procedures afforded by the State prior to a final adversary hearing, the Simses also claimed that an attorney *ad litem* should be appointed for a child in any suit affecting the parent-child relationship and that, where the State sought conservatorship of a child or termination of the parent-child relationship, it should

federal court had nothing to do with that question. The issues raised by their federal complaint did not go to their fitness as parents or to their rights to permanent custody of their children. Rather, the thrust of their federal complaint was that the procedures employed by the State to gather information and to seize and retain the children pending the formal adversary hearing under ch. 11 violated the Constitution.[8]

As to these constitutional claims, the hearing to be afforded in state court on parental fitness and permanent custody was virtually as irrelevant as a hearing on a traffic violation. It is clearly the case, and the majority does not suggest otherwise, that the Simses could not avoid losing custody of their children at that point by successfully arguing that the State had acted unconstitutionally in its initial seizure of the children, or that a hearing should have been afforded earlier. These claims could not be raised "as a defense to the ongoing proceedings," *Juidice* v. *Vail*, 430 U. S. 327, 330; [9] nothing in the ch. 11 determinations required the court to consider or pass upon the different issues that the Simses sought to raise in federal court.

It may well be, as the majority suggests, that the Simses could have raised their constitutional claims against the State, not in defense, but in the nature of permissive counterclaims. The findings of the District Court, however, suggest the contrary.[10] But even if Texas does allow a party to raise any and

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be required to prove its case by clear and convincing evidence. The second claim relates only to the rules governing the formal ch. 11 hearing; the first to that hearing as well as prior hearings which they claimed were required.

[8] See 438 F. Supp., at 1187.

[9] "[T]he plaintiffs' constitutional challenge is directed primarily at the legality of the children's seizure and detention for a 42-day period without a hearing. It is clear that because this issue cannot be raised as a defense in the normal course of the pending judicial proceeding, abstention would be inappropriate." *Ibid.*

[10] "[T]here is no single state proceeding to which the plaintiffs may look for relief on constitutional or any other grounds." *Ibid.*

all claims against the other party—no matter how unrelated—in a single proceeding, it certainly does not mandate that he do so. Broadening the scope of the state litigation to encompass new and difficult issues could only complicate and delay the Simses' efforts to obtain a hearing on the merits of the State's complaint as promptly as possible. In the meantime, of course, custody of the children would remain with the State and the deprivation of the parents' interests in the integrity of the family unit would continue.

The *Younger* doctrine does not require a litigant to pursue such an unwise and impractical course of litigation. *Younger* does not bar federal-court consideration of "an issue that could not be raised in defense of the criminal prosecution." *Gerstein* v. *Pugh*, 420 U. S. 103, 108 n. 9.[11] The considerations of comity, equity, and federalism underlying that doctrine are no more implicated by the *Sims* decision that claims unrelated to a pending state proceeding should be brought in federal rather than state court than they are by a similar decision in the absence of an unrelated state proceeding. If there is no requirement that federal plaintiffs initiate constitutional litigation in state rather than federal court in the first instance—and this Court has repeatedly held that there is not[12]—then the coincidence of an unrelated state proceeding provides no justification for imposing such a requirement.

While this factor alone is sufficient to render the *Younger* doctrine inapplicable, there is an even more basic objection to its application here. *Younger* abstention in these circumstances does not merely deprive the plaintiffs of their right to initiate new claims in the forum of their choice. Far more seriously, it deprives them of any relief at all. For this state forum could not and did not afford plaintiffs the sufficient op-

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[11] See also *Fuentes* v. *Shevin*, 407 U. S. 67. See generally Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1318–1319 (1977).

[12] See n. 3, *supra*.

portunity to vindicate their constitutional rights that is not only a predicate to a *Younger* dismissal, but also their entitlement under the Constitution.

The three Sims children were taken into custody by the Harris County Child Welfare Unit on March 25, 1976, based on a telephone report that one of the children was possibly the victim of child abuse. After "diligent" but unsuccessful efforts by the parents to be heard in state court, they finally went to federal court where, 42 days after they lost custody of their children, the Simses were heard for the first time in a court of law and their children were returned to them.[13] In due course, the federal court held that the state statutory procedures were defective because they did not provide for adequate notice to the parents, and did not provide for an adequate hearing whenever the State sought to retain custody for more than 10 days. Although other portions of the District Court decision as to the State's procedures are challenged by the appeal in this Court, the appellants have not questioned these aspects of the District Court's judgment.[14] It is there-

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[13] The majority does not address separately the question of the federal court's authority to order the children returned to custody of their parents pending the final state hearing. Since that order did not resolve the merits of any issue to be decided in the state proceeding under ch. 11, I see no basis for distinguishing that decision from the District Court's underlying holdings that the statutory scheme pursuant to which the children were seized and detained by the State is unconstitutional.

[14] Specifically, the appellants do not challenge the validity of paragraphs 2, 5, 6, 7, and 8 of the judgment entered by the District Court; these paragraphs read as follows:

"2. That the use of Section 11.11 (a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

. . . . .

"5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the

fore undisputed that the Texas procedures did not afford the parents a fair opportunity to vindicate their rights.

"[T]he opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," [15] is, of course, required to support a *Younger* dismissal. And in the circumstances of this case, it is also—concededly—required by the Due Process Clause. Here, such an opportunity was simply not available in the state-court system; the opportunity

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parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

"6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

"7. That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

"8. That Section 34.05 (c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained." App. A–102—A–103.

[15] *Gibson* v. *Berryhill*, 411 U. S. 564, 577. In *Gibson*, the Court concluded that this predicate to a *Younger* dismissal was not present because of the District Court's conclusion—on the merits of the plaintiffs' challenge—that the State Board was incompetent to adjudicate the issues pending before it. The critical point was that "the administrative body itself was unconstitutionally constituted, and so not entitled to hear the charges filed against the appellees." 411 U. S., at 577. The case before us is analogous: if the District Court here is correct—and the State accepts that it is, at least in part—that the procedures afforded by the State after its seizure of the children fail to comport with the minimum requirements of due process, then there is no more reason to abstain in favor of an unconstitutionally limited opportunity than in favor of the unconstitutionally composed Board in *Gibson*. The availability of a later full hearing in state court does not cure the problem in either case. As the Court recognized in *Gibson*, a subsequent *de novo* hearing cannot undo the interim harm to constitutional rights. *Id.*, at 577 n. 16. See also *Juidice* v. *Vail*, 430 U. S., at 340–341 (STEVENS, J., concurring in judgment).

to be heard at a later ch. 11 hearing is, as the State accepts, too late to meet the requirements of due process and to afford relief as to the interim deprivation. By ordering abstention nonetheless, the majority is not only extending the *Younger* doctrine beyond its underlying premise, but is also implicitly sanctioning a deprivation of parental rights without procedural protections which, as the State itself agrees, are constitutionally required.[16]

In my judgment, there could be no serious criticism of a holding that the *Younger* doctrine could properly be invoked in this case to bar consideration of the limited and easily divisible aspects of the Simses' challenge which were directed at the procedures to be followed in the ch. 11 adversary hearing.[17] That hearing would afford the parents "a fair and sufficient opportunity" to raise those claims, and there is no reason why the State should not have been able, if it wished, to go forward with an adversary hearing in the April 5 suit. Were the Court's decision today so limited, it would be supported by its prior cases. But in going further and holding that the federal court should have abstained as to the legality of the State's prehearing procedures and practices, the Court is applying the *Younger* doctrine where it simply does not belong. The District Court's finding that plaintiffs did not have a fair opportunity to pursue these constitutional claims in an ongoing state proceeding is amply supported by the record and the concessions of the State. This finding should foreclose any claim that the *Younger* doctrine makes abstention appropriate. I respectfully dissent.

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[16] In some sense, every *Younger* dismissal involves an implicit constitutional decision that remitting the federal plaintiff to defend in the state forum is not itself a deprivation of his constitutional rights. In *Younger* itself, the Court was careful to point out that "[n]o citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts." 401 U. S., at 46. The same cannot be said about the extended deprivation of custody of one's children without any form of notice or hearing.

[17] See n. 6, *supra*.

SOUTHERN RAILWAY CO. *v.* SEABOARD ALLIED MILLING CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–575. Argued April 23, 1979—Decided June 11, 1979*

When petitioner railroads proposed a seasonal increase in the shipping rates for grain and soybeans, a number of shippers filed protests with the Interstate Commerce Commission (ICC) requesting that it exercise its authority under § 15 (8) (a) of the Interstate Commerce Act (Act) to suspend such rates and to investigate the charges of their illegality. But the ICC issued an order declining such request, although it admonished the railroads to correct any such violations as might exist and directed that records be kept to protect the shippers' right to recover damages in such subsequent proceedings as they might bring pursuant to § 13 (1) of the Act. The Court of Appeals held that the ICC had begun an investigation but had then erroneously terminated it without adequately investigating the charges of illegality and without supporting its decision with appropriate findings. The court concluded that a decision by the ICC to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff is subject to judicial review, even though suspension orders are not, primarily because a single § 15 (8) (a) proceeding initiated by the ICC is a better means of determining the lawfulness of rates than numerous § 13 (1) complaint proceedings initiated by shippers.

Held:

1. To the extent that the Court of Appeals interpreted the ICC's order as a final decision that the proposed tariff was lawful, rather than simply a discretionary decision not now to investigate its lawfulness, it misconstrued the order. The order's express language belies any such interpretation, and the ICC did not reject the shippers' claim of illegality on the merits but on the contrary admonished the railroads about possible violations. Moreover, since the ICC expressly indicated that charges of violation of the Act could be resolved in § 13 (1) proceedings, it is plainly incorrect to interpret its action as a prejudgment on the issue. Pp. 452–454.

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*Together with No. 78–597, *Interstate Commerce Commission* v. *Seaboard Allied Milling Corp. et al.*; and No. 78–604, *Seaboard Coast Line Railroad Co. et al.* v. *Seaboard Allied Milling Corp. et al.*, also on certiorari to the same court.

2. The ICC's "no investigation" decision is not subject to judicial review. Pp. 454–463.

(a) This conclusion is supported by § 15 (8) (a)'s language of permission and discretion (the ICC "*may*, upon the complaint of an interested party . . . , order a hearing concerning the lawfulness of [a] rate"), and by the fact that the statute is silent on what factors should guide the ICC's decision. Pp. 455–456.

(b) The structure of the Act also indicates that Congress intended to prohibit judicial review of the ICC's "no investigation" decision. Congress did not use permissive language such as that found in § 15 (8) (a) when it wished to create reviewable duties under the Act, but instead used mandatory language such as in § 13 (1). To treat § 15 (8) (a) as if it were written in § 13 (1)'s mandatory language, would allow shippers to use the open-ended and ill-defined procedures in § 15 (8) (a) to render obsolete the carefully designed and detailed procedures in § 13 (1). Moreover, in view of the linkage between the ICC's power to investigate and its power to suspend proposed rates, the decisions holding that the merits of a suspension order are not reviewable, *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289; *United States* v. *SCRAP*, 412 U. S. 669; *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, furnish further authority for holding that a "no investigation" decision is not reviewable. Pp. 456–459.

(c) The legislative history of the Mann-Elkins amendments adding § 15 (8) to the Act further supports nonreviewability of "no investigation" decisions. Prior to those amendments, the ICC had no authority to suspend rates, or to adjudicate their lawfulness in advance either of their becoming effective or of their being challenged in a § 13 (1) complaint, and the adoption of § 15 (8) was designed to avoid the disruptive consequences of judicial interference with the ICC's ratemaking process. To allow the courts to review § 15 (8) (a) investigation decisions would amount to "backhanded approval" of these same consequences, and judicial review would once again undermine the ICC's primary jurisdiction by bringing courts into the adjudication of the lawfulness of rates in advance of administrative consideration. Pp. 459–460.

3. There is no statutory support for a compromise position that, while not immediately reviewable, the ICC's decisions under § 15 (8) (a) do become reviewable later, upon the completion of whatever proceedings may be initiated under § 13 (1). While the § 13 (1) remedy lessens the risk of harm from the ICC's initial refusal to investigate or suspend under § 15 (8) (a), that remedy is independent of § 15 (8) (a) proceedings. Pp. 463–464.

570 F. 2d 1349, reversed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

Mark L. Evans argued the cause for petitioner in No. 78–597. With him on the briefs were *Christine N. Kohl* and *James P. Tuite*. *Wandaleen Poynter* argued the cause for petitioners in No. 78–604. With her on the briefs were *Donal L. Turkal*, *Fred R. Birkholtz*, and *Richard A. Hollander*. *Michael Boudin* and *Clare Dalton* filed briefs for petitioner in No. 78–575.

Richard A. Allen argued the cause for the United States as respondent in all cases. With him on the briefs were *Solicitor General McCree* and *Deputy Solicitor General Easterbrook*. *John H. Caldwell* argued the cause for respondents Seaboard Allied Milling Corp. et al. in all cases. With him on the brief were *Peter A. Greene*, *Rufus L. Edmisten*, Attorney General of North Carolina, *Jacob Safron*, Special Deputy Attorney General, *Richard L. Griffin*, Associate Attorney General, *Theodore L. Sendak*, Attorney General of Indiana, *William G. Mundy*, Deputy Attorney General, and *Donald P. Bogard*. *Harold E. Spencer* argued the cause for respondents Board of Trade of the City of Chicago et al. in all cases. With him on the brief were *Thomas F. McFarland, Jr.*, and *Richard S. M. Emrich III*.†

MR. JUSTICE STEVENS delivered the opinion of the Court.

On September 14, 1977, the Interstate Commerce Commission decided not to exercise its authority under § 15 (8)(a) of the Interstate Commerce Act (Act) to order a hearing to investigate the lawfulness of a seasonal rate increase proposed by a group of railroads.[1] The question presented is

†*J. Raymond Clark*, *John L. Taylor, Jr.*, and *John R. Molm* filed a brief for Potomac Electric Power Co. et al. as *amici curiae* urging affirmance.

[1] At all relevant times, § 15 (8) provided in pertinent part:

"(a) Whenever a schedule is filed with the Commission by a common

whether the Commission's refusal to conduct such an investigation is subject to judicial review.

Because the Courts of Appeals for the Eighth Circuit, *Seaboard Allied Milling Corp.* v. *ICC*, 570 F. 2d 1349, and the District of Columbia Circuit have answered this question differ-

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carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

"(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions . . . ." 90 Stat. 2630, 49 U. S. C. § 15 (8).

On October 17, 1978, President Carter signed into law Subtitle IV of Title 49, United States Code, "Transportation," 49 U. S. C. § 10101 *et seq.* (1976 ed., Supp. II), which recodifies and revises some of the archaic language of the Interstate Commerce Act. See Note preceding 49 U. S. C. § 10101 (1976 ed., Supp. II). Section 10707 of the recodified Title 49 corresponds to § 15 (8) of the old statute. In this opinion we shall refer to the relevant statutes by their former designations.

ently,[2] we granted certiorari. 439 U. S. 1066. We now hold that the Commission's "no investigation" decision is not reviewable.

Petitioner railroads' rate schedule was the first one proposed under § 202 (d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4–R Act). 90 Stat. 36, amending 49 U. S. C. § 15 (1970 ed.). See App. to Pet. for Cert. in No. 78–597, p. 28a. That provision directs the Commission to adopt "expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services." [3]

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[2] In *Asphalt Roofing Mfg. Assn.* v. *ICC*, 186 U. S. App. D. C. 1, 8–9, 567 F. 2d 994, 1001–1002 (1977), the Court of Appeals for the District of Columbia Circuit held:

"The orders challenged in each of these proceedings permitted rates filed by the railroads to go into effect without either investigation or suspension. It is firmly settled that ICC orders suspending rate increases for the statutory period are within the agency's sole discretion and are judicially unreviewable. . . . The United States and the petitioners urge that a distinction should be drawn between Commission orders refusing to suspend rate increases and those declining to institute an investigation; the latter, they argue, should be held reviewable. The basic difficulty with this argument is that section [15 (8) (a)], which empowers the Commission both to suspend and to investigate proposed rate increases, grants both powers in substantially the same language. There is therefore no ground, on the basis of the Act, for treating the two powers differently for purposes of reviewability. We hold that the reviewability of the Commission's decision to permit the rate increases in these proceedings to go into effect without suspension or investigation is controlled by the cases holding the Commission's decision whether to suspend a rate increase to be unreviewable."

[3] Section 202 (d), codified originally at 49 U. S. C. § 15 (17) and as set forth therein, provides as follows:

"Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employ-

In August 1977, after the Commission had promulgated its new standards and procedures for seasonal rate adjustments, see *Ex parte No. 324*, 355 I. C. C. 522, the Southern Freight Association proposed a 20% increase in the rates for grain and soybeans shipped from the Midwest in railroad-owned cars between September 15 and December 15, 1977. The railroads supported their proposal with statistics describing the high volume of grain shipments in the fall, an explanation of the anticipated effect of the temporary rates on railcar usage, and some cost evidence.

A number of shippers and large users of transported grain (hereinafter shippers) filed protests claiming the proposed rates were unlawful.[4] They requested that the Commission exercise its authority under § 15 (8) (a) to suspend these rates and to investigate the charges of illegality. On September 14, 1977, a month after the rates were filed, and eight days after receiving the protests, the Commission issued its order declining either to suspend or to investigate the legality of the rates. App. 286–291.

In that order the Commission admonished the railroads "to take prompt action to remove violations of the long-and-short-haul provision of section 4 (1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole

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ment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates."

The provision is currently codified in 49 U. S. C. § 10727 (1976 ed., Supp. II). See n. 1, *supra*.

[4] The shippers objected to the rates as unreasonably high in violation of 49 U. S. C. § 1 (5); as discriminatory contrary to §§ 2, 3 (1), because they applied only to railroad-owned cars; as not conforming to the goals of the seasonal-rate authorization; and as violating the long-and-short-haul clause of § 4 (1).

grains between points in southern territory." *Id.*, at 288. Moreover, the Commission directed the carriers to file detailed weekly reports relating to the effects of the new schedules, *id.*, at 289–290 (and, in a later order, to keep accounts of all charges and receipts under the rates, *id.*, at 302), and "out of caution" it instructed its Bureau of Investigations and Enforcement and Bureau of Operations "to closely monitor this matter." *Id.*, at 290. With respect to the basic question whether to suspend the rates and conduct a formal investigation, the Commission concluded:

> "Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective." *Id.*, at 289.

It noted, however, that § 13 (1) of the Act, which allows shippers to initiate mandatory posteffective proceedings to inquire into and remedy violations of the Act, would still be available to "protect" persons aggrieved by the rates.[5] App. 289.

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[5] Section 13 (1) provides:

"Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate

Immediately after the Commission entered its order, two judges of the Court of Appeals granted an *ex parte* application for a temporary stay and enjoined the Commission from permitting the tariff to go into effect. *Id.*, at 295. Eight days later, however, the court dissolved its stay and the new rates went into effect. *Id.*, at 298–300. Two months after the seasonal tariff had expired, the Court of Appeals filed its opinion concluding that the Commission had begun an investigation but had then erroneously terminated it without "adequately investigat[ing] the charges" of "patent illegality" and without supporting its decision "with appropriate findings and conclusions." 570 F. 2d, at 1352, 1355, 1356. It directed the Commission to hold hearings to investigate more fully the protestants' charges of patent illegality and, if the investigation revealed that the tariff was unlawful, to make appropriate provisions for refund of increased charges collected under the tariff. *Id.*, at 1356.

Although some of the just-quoted passages suggest that the Court of Appeals viewed the Commission's order as an inadequately investigated decision on the merits, other passages indicate that it reviewed and disapproved of the order, realizing that it was a decision *not* to reach the merits and *not* to investigate the lawfulness of the rates. Because the period covered by the seasonal tariff had already expired, the court first stated that it would not decide whether the Commission's refusal to suspend the effectiveness of the rates pending investigation was reviewable. *Id.*, at 1352. Assuming, however, that *United States* v. *SCRAP*, 412 U. S. 669, 698, and *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 667–668, had established that a suspension decision is not reviewable, the court reasoned that the Commission's suspension and inves-

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the matters complained of in such manner and by such means as it shall deem proper." 49 U. S. C. § 13 (1).

This provision is currently codified in 49 U. S. C. § 11701 (b) (1976 ed., Supp. II). See n. 1, *supra*.

tigation powers are separate and distinct and that the factors that had prompted this Court in *Arrow* "to hold suspension orders not reviewable are not applicable to decisions of the Commission to refuse to make or to terminate an investigation of the lawfulness of a proposed tariff." 570 F. 2d, at 1353. It then concluded that the latter type of decision is subject to judicial review even though the former is not, primarily because, in its view, a single § 15 (8)(a) proceeding initiated by the Commission is a better means of determining the lawfulness of the rates than numerous § 13 (1) complaint proceedings initiated by shippers contending that they have been overcharged. 570 F. 2d, at 1355.

We reverse. First, to the extent that the Court of Appeals interpreted the Commission's order as a final decision that the tariff was lawful, rather than simply a discretionary decision not now to investigate its lawfulness, it has misconstrued the order. Second, to the extent that its decision transcends this misinterpretation of the Commission's order and suggests that even a "no investigation" determination would be reviewable, it has misconstrued Congress' intent with respect to § 15 (8)(a).

I

It is, of course, true that a decision by the Commission following a § 15 (8) investigation to approve or disapprove a set of rates is a judicially reviewable final decision. *E. g., United States* v. *Louisiana,* 290 U. S. 70. See *Chicago* v. *United States,* 396 U. S. 162. The shippers contend that this rule governs here. In their view, the Commission, by reviewing and then leaving intact rates it knew to be unlawful, effectively approved those rates. But the express language of the Commission's order belies any interpretation of its decision as a ruling on the legality of petitioner railroads' seasonal tariff.

The claim of illegality most forcefully urged by the shippers, both here and in the Court of Appeals, is that the schedules contain a number of violations of the long-and-short-

haul restrictions in § 4 (1) of the Act. The Commission did not reject this claim on its merits; on the contrary, it admonished the carriers to correct any such violations that might exist and directed that records be kept to protect the shippers' right to recover their damages in such subsequent proceedings as they might bring pursuant to § 13 (1) of the Act. App. 288–290. Since the Commission expressly indicated that charges of violation of § 4 (1) could be resolved in § 13 (1) proceedings, App. 289, it is plainly incorrect to interpret its action as a prejudgment of the issue.[6]

The Commission did note in addition that "the evidence offered to support the alleged [§ 4 (1)] violations [did] not warrant suspension" or investigation. *Id.*, at 288. But, in light of the nature of the inquiry that the Commission makes when a request for suspension and investigation of an areawide group of rates is filed, this, too, is clearly not a decision that there were no violations. Since 1910, when § 15 (8) (a)'s precursor was added to the Act, the Commission has typically made its suspension and investigation decisions simultaneously; indeed, the Act appears to contemplate that result. See *infra*, at 458–459. In addition, the Act leaves the Commission only 30 days to decide on suspension before the rates automatically become effective. 49 U. S. C. § 6 (3). The Commission's primary duty, therefore, is to make a prompt appraisal of the probable and general reasonableness and legality of the proposed schedule—which may, as in this case, involve thousands of rates for designated commodities and routes—rather than a detailed review of the lawfulness of each individual component of the tariff schedules.[7] In

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[6] The analysis in text applies with equal force to the Commission's treatment of the alleged § 2 and § 3 (1) violations. See App. 288–289.

[7] Cf. *United States* v. *Louisiana*, 290 U. S. 70, 75–77; *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 312–313; *United States* v. *SCRAP*, 412 U. S. 669, 692 n. 16 (even after actually investigating an areawide rate schedule and finding that it contains individually unlawful

short, the Commission simply has no time to, and did not in these cases, finally decide on the lawfulness of the rate schedule or its individual components during the preliminary 30-day period.

II

Nor can § 15 (8) be read to tolerate judicial review of the Commission's decision *not* to investigate the lawfulness of a proposed rate schedule. Although we will not lightly interpret a statute to confer unreviewable power on an administrative agency, *Morris* v. *Gressette,* 432 U. S. 491, 501; *Dunlop* v. *Bachowski,* 421 U. S. 560, 567, we have no choice in this case. For the ultimate analysis is always one of Congress' intent, and in these cases, "there is persuasive reason to believe that [nonreviewability] was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140.

Initially, it is important to note the extremely limited scope of the administrative decision that we conclude is not judicially reviewable. We are not here concerned with the Commission's rate-suspension authority because, as we shall see, our prior cases have already placed the exercise of that authority beyond the control of the courts. Nor, in fact, are we holding entirely unreviewable the Commission's exercise of its rate-investigation authority. For any shipper may require the Commission to investigate the lawfulness of any rate at any time—and may secure judicial review of any decision not to do so—by filing a § 13 (1) complaint. *E. g., ICC* v. *Baird,* 194 U. S. 25, 39.

Instead, our sole concern is the Commission's decision not to investigate under § 15 (8)(a), a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13 (1) rather than on the carrier, who would have borne it in a § 15 (8)(a) proceeding. (With respect to all other aspects

components, the Commission may properly approve it if the rates are "generally" lawful).

of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13 (1) to actual damages rather than the full refund of overcharges available under § 15 (8)(a). It is only with regard to these two determinations, neither of which necessarily affects any citizen's ultimate rights,[8] that we conclude—based on the language, structure, and history of the Act as well as the relevant case law—that the agency's exercise of discretion is unreviewable.

A

With respect to the Commission's investigation power, § 15 (8)(a) is written in the language of permission and discretion. Under it, "the Commission *may*, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of [a] rate [which] hearing may be conducted without answer or other formal pleading . . . ." (Emphasis added.)

The statute is silent on what factors should guide the Commission's decision; not only is "[t]he extent of this inquiry . . . not . . . marked . . . with certainty," cf. *United States* v. *Louisiana*, 290 U. S., at 77, but also on the face of the statute there is simply "no law to apply" in determining if the decision is correct. Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410.[9] Similar circum-

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[8] If a shipper proves that a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13 (1) proceeding will be no different than that of a § 15 (8)(a) proceeding in which the carrier fails to establish the reasonableness of the rate.

[9] Our cases foreclose requiring the Commission to disapprove, much less to investigate, every rate schedule that can be shown to include some individually unlawful rates. *E. g.*, *United States* v. *Louisiana*, *supra*, at 75–77. The standard proposed by the Court of Appeals, which would require an investigation if individual rates are "patently illegal," is equally foreclosed by those cases. Moreover, like the standard proposed by the Solicitor General, Brief for United States 34 (review for "abuse of discre-

stances have been emphasized in cases in which we have inferred nonreviewability. See *Barlow* v. *Collins*, 397 U. S. 159, 166; *Schilling* v. *Rogers*, 363 U. S. 666, 674.

B

The structure of the Act also indicates that Congress intended to prohibit judicial review. Congress did not use permissive language such as that found in § 15 (8)(a) when it wished to create reviewable duties under the Act. Instead, it used mandatory language, and it typically included standards to guide both the Commission in exercising its authority and the courts in reviewing that exercise. In particular, § 13 (1), which plainly authorizes rate-investigation decisions that are reviewable, *ICC* v. *Baird*, *supra*, at 39, provides that "[i]f . . . there shall appear to be any reasonable ground for investigating said complaint, it *shall* be the duty of the Commission to investigate the matters complained of . . . ." (Emphasis added.) The Court of Appeals' interpretation therefore treats § 15 (8)(a) as if it were written in the mandatory language of § 13 (1).

Of even greater significance, that interpretation would allow shippers to use the open-ended and ill-defined procedures in § 15 (8)(a) to render obsolete the carefully designed and detailed procedures in § 13 (1). For under the court's reading, at least when one of the perhaps thousands of rates in a proposed schedule is "patently illegal," any party could (and, given the burden-of-proof and remedial advantages, many surely would) force the Commission immediately to undertake an investigation under § 15 (8)(a) and to reach a judicially reviewable decision on the legality of the rates. Nothing would be left for consideration under § 13 (1). We, of course, are reluctant almost a century after the Act was passed to

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tion or [action] contrary to [Commission's] statutory mandate"), it is entirely without support in the statute.

adopt an interpretation of it that would effectively nullify one of its original and most frequently used provisions.

The disruptive practical consequences of such a determination confirm our view that Congress intended no such result. The Commission reviews over 50,000 rate-schedule filings each year; many, including the one involved here, contain thousands of individual rates. See 91 ICC Ann. Rep. 113 (1977). If the Commission, which generally makes its § 15 (8)(a) investigation decisions within 30 days in order to allow *pre*-effective suspension, must carefully analyze and explain its actions with regard to each component of each proposed schedule, and if it must increase the number of investigations it conducts, all in order to avoid judicial review and reversal, its workload would increase tremendously.

These practical effects of reviewability would be especially disruptive in the present context of seasonal rates proposed under § 202 (d) of the 4–R Act. The policies underlying that provision favor greater freedom of action by the railroads, greater rate flexibility, especially with respect to short-term rates, and more limited supervision by the Commission[10]—all of which would be disserved if the courts may examine the Commission's initial investigation decisions with respect to temporary rate adjustments. Furthermore, an increase in the number of rate investigations in which the railroad, rather than the challenging party, bears the burden of proof and

[10] In its declaration of policy with respect to the Title of the 4–R Act that included the precursor of § 202 (d), the Senate Report on that Act stated:

"[T]he purposes of [the Title] include fostering competition among all carriers in order to promote more adequate and efficient transportation and the attractiveness of rail investment, permitting greater railroad price flexibility, promotion of a rate structure more sensitive to variations in demand and separate rates for distinct services, formulation of standards and guidelines for determining adequate revenue levels, and modernizing and clarifying the functions of rate bureaus." S. Rep. No. 94–499, p. 45 (1975). See also *id.*, at 15 (primary purpose of the 4–R Act amendments was to end "excessive regulatory delay"); n. 3, *supra*.

in which the challenger need not prove actual damages before recovering refunds would be out of place in a regulatory system that leaves "the initiative in setting rates . . . with the railroad." *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 311.

There is an additional structural reason why the Commission's investigation decisions are unreviewable. Section 15 (8) was originally included in the Mann-Elkins Act of 1910, 36 Stat. 552. As adopted, and as it has remained during the ensuing 70 years, the provision has given the Commission the power not only to investigate but also to suspend proposed rates. 49 U. S. C. § 15 (8)(b). Congress phrased the two powers in precisely the same language and placed the same time limits on the exercise of both. See *Asphalt Roofing Mfg. Assn.* v. *ICC*, 186 U. S. App. D. C. 1, 8–9, 567 F. 2d 994, 1001–1002 (1977); n. 2, *supra*. The two powers are inextricably linked because the Commission has no occasion to suspend a rate unless it also intends to investigate it. See *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500, 512–513 (*Chessie*).

In view of this linkage, we need look no further than our previous decisions concluding that the merits of a suspension decision are not reviewable to find a sufficient answer to the question presented in these cases. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, *supra*, at 311; *United States* v. *SCRAP*, 412 U. S., at 691–692, 698; *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658.[11] Indeed, if any distinction is to be

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[11] See also *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631, 638–639, n. 17. In those cases, the Court reaffirmed the conclusion in *Arrow* and the *SCRAP* cases "that courts may not independently appraise the reasonableness of rates"—*i. e.*, the merits—in reviewing suspension decisions. It did, however, "conclude that Congress did not mean to cut off judicial review for [the] limited purpos[e]" of deciding whether the Commission had jurisdiction to suspend the rates in question, *i. e.*, whether they were "new rates" within the meaning of § 15 (8)(a). See also *Schilling* v. *Rogers*, 363 U. S. 666, 676–677 ("different considerations" apply to

drawn, it would make more sense to subject suspension rather than investigation decisions to review, for the pre-effective suspension of a new rate has a greater and more immediate impact on carriers and shippers than does the initiation of an investigation whose outcome is inevitably in doubt. See *Trans Alaska Pipeline Rate Cases,* 436 U. S. 631, 641; *Chessie, supra,* at 513.[12]

C

The legislative history of the Mann-Elkins amendments to the Act also supports nonreviewability. Prior to the enactment of those amendments, the Commission had no authority to suspend rates, or to adjudicate their lawfulness in advance either of their becoming effective or of their being challenged by a private party in a § 13 (1) complaint. In the years immediately preceding the enactment of the amendments, rapidly rising rates encouraged shippers, with some success, to ask the courts to enjoin unlawful rates before they went into effect. As a result of the ensuing judicial intervention in the

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the reviewability of an agency "refus[al] or fail[ure] to exercise a statutory discretion" than to the reviewability of its decision once it does exercise that discretion). Here, it is conceded by all that the Commission has authority with respect to rates such as those at issue either to suspend (or investigate) or not to suspend (or investigate) them and that it has exercised its authority. The question raised is whether it did so correctly under the particular circumstances involved—a question that cannot be answered by a reviewing court without "independently apprais[ing] the [lawfulness] of [the] rat[e]."

[12] Similarly, the situation in *Arrow,* in which the courts first held a "no suspension" decision unreviewable, was far more conducive to a finding of reviewability than the situation presented by these cases. For in *Arrow,* the parties seeking judicial intervention were competitors of the railroads alleging predatory pricing, rather than shippers alleging excessive pricing. As such, it was uncertain—and the Court expressly refused to decide—whether those complainants had access to the posteffective judicial remedies that are available to shippers such as respondents here. See 372 U. S., at 669. In short, it was possible in *Arrow,* but not here, that nonreviewability would leave the aggrieved party without any judicial remedy at all.

ratemaking process, the Commission was divested of much of its primary jurisdiction with respect to rates, and the public was subjected to nonuniform rates that depended on whether or not the local district court had issued an injunction. See 21 ICC Ann. Rep. 9–10 (1907); 22 ICC Ann. Rep. 10–12 (1908); 23 ICC Ann. Rep. 6–7 (1909).[13]

As discussed at greater length in *Arrow, supra,* at 662–672, the adoption of § 15 (8) was designed to avoid these disruptive consequences of judicial interference. If we should now allow the courts to review § 15 (8) investigation decisions, we would be giving "backhanded approval" to these very same consequences. 372 U. S., at 664. Judicial review would once again undermine the Commission's primary jurisdiction by bringing the courts into the adjudication of the lawfulness of rates in advance of administrative consideration. As we said in *Arrow* with respect to judicially mandated rate suspension:

> "A court's disposition of an application for [an order directing the Commission to investigate rates] would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable [or otherwise unlawful]. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain." *Id.,* at 669–670.

Moreover, this allowance for independent judicial appraisal of the reasonableness of rates by every court of appeals in the country might replicate the judicially created "hazard[s] to uniformity" that, along with the courts' assault on the Commission's primary jurisdiction, prompted Congress to pass § 15 (8) in the first place. See 372 U. S., at 671.[14]

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[13] See generally 1 I. Sharfman, The Interstate Commerce Commission 49–55 (1931); Spritzer, Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices, 120 U. Pa. L. Rev. 39, 45–49 (1971).

[14] Although most of the debate surrounding the relevant portions of the Mann-Elkins Act was concerned with the suspension power, it is absolutely

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Given the strength of the statutory and legislative evidence supporting nonreviewability, it is not surprising that prior to 1977 no court had ever even adverted to the possibility of reviewing a "no investigation" decision under § 15 (8)(a). Nonetheless, this Court has indicated on at least two occasions that the decision whether the Commission should commence an investigation under an analogous provision in the Act, § 13a (1), is committed to the agency's discretion and therefore not reviewable.[15]

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clear both that Congress intended to commit that power to the unfettered discretion of the Commission and that it perceived it and the investigation power as closely linked. *E. g.*, S. Rep. No. 355, 61st Cong., 2d Sess., pt. 1, p. 9 (1910); 45 Cong. Rec. 3472 (1910) (Sen. Elkins); *id.*, at 462 (transmittal message of Pres. Taft).

[15] Title 49 U. S. C. § 13a (1) provides in relevant part:

"A carrier . . . may, but shall not be required to, file with the Commission . . . notice at least thirty days in advance of any . . . proposed discontinuance or change [in service]. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph . . . . Upon the filing of such notice the Commission *shall have authority* during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of opera-

In *Chicago* v. *United States*, 396 U. S. 162, the Court held that orders discontinuing § 13a (1) investigations into the propriety of certain changes in passenger service were reviewable rulings on the merits. In so holding, however, the Court expressly distinguished a Commission decision on the question whether an investigation should be undertaken in the first place, saying:

> "Whether the Commission should make an investigation of a § 13a (1) discontinuance [of passenger service] is of course within its discretion, a matter which is not reviewable. *New Jersey* v. *United States*, 168 F. Supp. 324, aff'd, 359 U. S. 27." 396 U. S., at 165.

In the *New Jersey* case cited in *Chicago*, a three-judge District Court had squarely held that the Commission's refusal to commence a § 13a (1) investigation into a railroad's abandonment of service was not reviewable. See 168 F. Supp. 324, 328 (NJ 1958). Our summary affirmance of that holding in 359 U. S. 27, while having less precedential value than an opinion in an argued case, was nonetheless a ruling on the merits, *Hicks* v. *Miranda*, 422 U. S. 332, and it, along with the *Chicago* dictum, strongly supports the nonreviewability of § 15 (8)(a) investigation determinations.

In short, the necessary " 'clear and convincing evidence' that Congress meant to prohibit all judicial review" of the Commission's limited decision not to initiate an investigation under § 15 (8)(a) is provided by the language of the statute, as well as its place within the statutory design of the Act, its legislative history, and the light shed on it by our case law concerning analogous statutes. *Dunlop* v. *Bachowski*, 421

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tion or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order." (Emphasis added.)

This provision, it should be noted, closely parallels § 15 (8)(a). Both use permissive language and both grant the Commission mutually supportive investigation and suspension powers.

U. S., at 568. See *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141.

III

We also find no statutory support for the Solicitor General's belated compromise position that, while not immediately reviewable (*i. e.*, not "final" at the stage of the administrative proceedings involved in these cases), the Commission's decisions under § 15 (8)(a) do become reviewable later, upon the completion of whatever proceedings may be initiated under § 13 (1).[16] Under this novel reading of the Act, if a shipper is denied § 13 (1) relief, he not only may appeal that decision to a court of appeals but also may appeal the Commission's earlier decision not to suspend or investigate a rate under § 15 (8)(a).

Although it is true that the § 13 (1) remedy lessens the risk of harm from the Commission's initial refusal to investigate or to suspend under § 15 (8)(a), *Aberdeen & Rockfish R. Co.*, 422 U. S., at 311, it is nonetheless clear that that remedy is independent of § 15 (8)(a) proceedings. First, the language of § 15 (8)(a) suggests no linkage to § 13 (1) nor any basis for judicial review at *any* point in the administrative process. Second, § 13 (1) has been an independent and self-contained procedure since the Act was first passed in 1887. When § 15 (8)(a) was added some 23 years later, there was no indication that it was intended as an *amendment* to § 13 (1), rather than as a limited pre-effective and Commission-initiated *alternative* to the posteffective and shipper-initiated procedures in § 13 (1). Third, if shippers are encouraged in every case to request investigations under § 15 (8)(a) in order to preserve for later review under § 13 (1) a claim that one was not conducted, and if the Commission's decisions are ultimately subjected to review, many of the practical problems

[16] The United States did not take this position in the Court of Appeals, nor, so far as we are advised, has this position previously been advanced to any federal court.

that we discussed above with respect to the Court of Appeals' approach would still arise.

In sum, the force of the arguments against reviewability of § 15 (8)(a) investigation decisions is not diminished by altering the point in the administrative process at which the courts are allowed to intrude.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

TORRES *v.* PUERTO RICO

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

No. 77–1609. Argued January 10, 1979—Decided June 18, 1979

When appellant arrived at the airport in San Juan, Puerto Rico, police officers, without a warrant or probable cause to suspect that appellant was carrying contraband, searched his baggage pursuant to a Puerto Rico statute authorizing the police to search the luggage of any person arriving in Puerto Rico from the United States. The search revealed marihuana, and appellant was subsequently charged with and convicted of a drug violation under Puerto Rico law. On appeal, he contended that the search violated the federal constitutional prohibition against unreasonable searches; the Puerto Rico Supreme Court affirmed the conviction.

Held:

1. The constitutional requirements of the Fourth Amendment apply to Puerto Rico. Both Congress' implicit determinations that the Amendment practically and beneficially may be implemented in Puerto Rico and long experience establish that the Amendment's restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness. From 1917 to 1952, Congress by statute afforded equivalent personal rights to Puerto Rico residents, and the Puerto Rico Constitution, which was adopted pursuant to Congress' authority and approved by Congress in 1952, contains the Fourth Amendment's language as well as language reflecting this Court's exegesis of the Amendment. Pp. 468–471.

2. The search of appellant's baggage pursuant to statute did not satisfy the requirements of the Fourth Amendment that there be probable cause to believe that incriminating evidence will be found and that there be a warrant unless exigent circumstances make compliance with this requirement impossible. P. 471.

3. The requirements of a warrant and probable cause are not subject to any exception that applies generally to persons arriving in Puerto Rico from the United States. The statute in question cannot be justified by any analogy to customs searches at a functional equivalent of the international border of the United States; Puerto Rico has no sovereign authority to control entry into its territory. Nor can the statute be sustained by analogy to state inspection provisions designed to implement health and safety legislation, the statute having been construed by the Puerto Rico Supreme Court as one enacted for the purpose of

enforcing criminal laws; moreover, health and safety inspections are generally subject to the Fourth Amendment warrant requirement. Pp. 472–474.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which STEWART, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 474.

Joseph Remcho argued the cause for appellant. With him on the briefs were *Celedonia Medin Lozada Hernandez* and *Celedonia Medin Lozada Gentile.*

Roberto Armstrong, Jr., Deputy Solicitor General of Puerto Rico, argued the cause for appellee. With him on the brief was *Hector A. Colon Cruz*, Solicitor General.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

I

In 1975, the Commonwealth of Puerto Rico enacted legislation authorizing its police to search the luggage of any person arriving in Puerto Rico from the United States. Pub. Law 22, P. R. Laws Ann., Tit. 25, § 1051 *et seq.* (Supp. 1977).[1] The "Statement of Motives" in the preamble to the statute indicates that it was enacted in response to a serious increase in the importation of firearms, explosives, and narcotics from

**Bruce J. Ennis* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

[1] Public Law 22, § 1, P. R. Laws Ann., Tit. 25, § 1051 (Supp. 1977), provides:

"The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances."

the mainland, and a concomitant rise in crime on the island. As construed by the Puerto Rico Supreme Court, Public Law 22 does not require the police to have probable cause to believe that they will find contraband before they search baggage. However, it does not appear that the luggage of all travelers arriving from the mainland is subject to this kind of search.

Appellant Terry Torres, a resident of Florida, arrived at San Juan's Isla Verde Airport aboard a nonstop commercial flight from Miami. An officer's suspicions were aroused when he observed that Torres seemed nervous, and kept looking at an armed, uniformed officer stationed nearby. There was, however, no articulable reason to suspect that Torres was carrying contraband. When Torres claimed his baggage, the officer stopped him, identified himself as an agent of the Criminal Investigation Bureau, and presented Torres with a card describing the provisions of Public Law 22. The uniformed officer approached at the same time; Torres was taken with his luggage to the Bureau's office at the airport.

Once there, the officer asked Torres if he understood what was written on the card. Torres said that he did, but he objected to having his luggage searched and asked to telephone his uncle, a Puerto Rico attorney. The officer refused to allow him to place the call, stating that he could contact a lawyer if it appeared that he had committed a crime. Torres then yielded to the search and unlocked his bags.

The search revealed one ounce of marihuana, a wooden pipe bearing marihuana residue, and approximately $250,000 in cash. Torres was charged, tried, and convicted of violating § 404 of the Controlled Substances Act of Puerto Rico, P. R. Laws Ann., Tit. 24, § 2404 (Supp. 1977). A sentence of from one to three years' imprisonment was imposed.

On appeal to the Supreme Court of Puerto Rico, Torres contended that the search pursuant to Public Law 22 violated the federal constitutional prohibition against unreasonable searches. Only seven of the eight justices of the Puerto Rico

Supreme Court participated in considering the appeal; four of the seven concluded that Public Law 22 violated the Fourth Amendment. Three justices held Public Law 22 constitutional. Article V, § 4, of the Puerto Rico Constitution provides that no law may be held unconstitutional except by a majority of all the members of the Supreme Court. Accordingly, there being only a minority of the justices so holding, the court entered a judgment stating:

> "The search of appellant's belongings being based on the provisions of Act No. 22 of August 6, 1975, *and considering the absence of the majority vote required by the Constitution to annul said Act,* the judgment appealed is affirmed." (Emphasis added.)

We noted probable jurisdiction. 439 U. S. 815 (1978).[2]

II

Decisions of this Court early in the century limited the application of the Constitution in Puerto Rico. In *Downes* v. *Bidwell,* 182 U. S. 244 (1901), we held that Congress could establish a special tariff on goods imported from Puerto Rico to the United States, and that the requirement that all taxes and duties imposed by Congress be uniform throughout the

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[2] Torres made an untimely motion for reconsideration in the Puerto Rico Supreme Court, asserting that the application of Art. V, § 4, to his appeal violated federal constitutional guarantees of due process. Presumably because of the untimeliness, the court denied the motion without opinion.

Torres seeks to renew this contention here. Since the judgment of conviction must be reversed because of the invalidity of the search, see *infra,* at 471–474, we need not address the issue.

The Commonwealth suggests that its Supreme Court should be allowed to address this issue because if it were to invalidate the special majority-vote requirement, it would then reverse appellant's conviction in accordance with the views of the majority of the justices who participated. We see no purpose in requiring the Puerto Rico Supreme Court to address a second federal constitutional issue which could not affect our holding.

United States, Art. I, § 8, cl. 1, was not applicable to the island. Mr. Justice Edward White's concurring opinion announced the doctrine that the United States could acquire territory without incorporating it into the Nation, and that unincorporated territory was not subject to all the provisions of the Constitution. 182 U. S., at 287–344. In support of this doctrine, the concurring opinion emphasized that full application of the Constitution to all territory under the control of the United States would create such severe practical difficulties under certain circumstances as to prohibit the United States from exercising its constitutional power to occupy and acquire new lands. *Id.*, at 305–311.

The distinction between incorporated and unincorporated territories was first adopted by a majority of the Court in *Dorr* v. *United States*, 195 U. S. 138 (1904); the Court sustained the refusal of the territorial government of the Philippines to seek indictments by grand jury or afford petit juries in criminal cases. The Court emphasized that imposition of the jury system on people unaccustomed to common-law traditions "may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice." *Id.*, at 145–146, 148. It also suggested that the constitutional guarantees as to juries should not be construed so as to hamper Congress in exercising its constitutional authority to govern the territories. *Id.*, at 148. The doctrine that the Constitution does not guarantee grand and petit juries in unincorporated territories was applied to Puerto Rico, notwithstanding that its residents theretofore had been granted United States citizenship, in *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922).

On the other hand, this Court has held or otherwise indicated that Puerto Rico is subject to the First Amendment Speech Clause, *id.*, at 314; the Due Process Clause of either the Fifth or the Fourteenth Amendment, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 668–669, n. 5 (1974); and the equal protection guarantee of either the Fifth or the

Fourteenth Amendment, *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599–601 (1976). In *Califano* v. *Torres*, 435 U. S. 1, 4 n. 6 (1978) (*per curiam*), we assumed without deciding that the constitutional right to travel extends to the Commonwealth.

Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling. *Mullaney* v. *Anderson*, 342 U. S. 415, 419–420 (1952). Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico. *Examining Board* v. *Flores de Otero*, *supra*, at 590. However, because the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight.

Both Congress' implicit determinations in this respect and long experience establish that the Fourth Amendment's restrictions on searches and seizures may be applied to Puerto Rico without danger to national interests or risk of unfairness. From 1917 until 1952, Congress by statute afforded equivalent personal rights to the residents of Puerto Rico. Act of Mar. 2, 1917, § 2, cl. 13–14, 39 Stat. 952, *repealed*, Act of July 3, 1950, § 5 (1), 64 Stat. 320 (effective July 25, 1952). When Congress authorized the people of Puerto Rico to adopt a constitution, its only express substantive requirements were that the document should provide for a republican form of government and "include a bill of rights." Act of July 3, 1950, § 2, 64 Stat. 319, 48 U. S. C. § 731c. A constitution containing the language of the Fourth Amendment, as well as additional language reflecting this Court's exegesis thereof, P. R. Const., Art. II, § 10, was adopted by the people of Puerto Rico and approved by Congress. See Act of July 3, 1952, 66 Stat. 327. That constitutional provision remains in effect.

We conclude that the constitutional requirements of the Fourth Amendment apply to the Commonwealth.[3] As in *Examining Board* v. *Flores de Otero, supra,* at 601, we have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment.

III

The search of appellant's baggage pursuant to Public Law 22 did not satisfy the requirements of the Fourth Amendment as we heretofore have construed it. First, the grounds for a search must satisfy objective standards which ensure that the invasion of personal privacy is justified by legitimate governmental interests. *Delaware* v. *Prouse,* 440 U. S. 648, 653–655 (1979). The governmental interests to be served in the detection or prevention of crime are subject to traditional standards of probable cause to believe that incriminating evidence will be found. Yet Public Law 22 does not require, and the officers who made the search challenged here did not have, probable cause for such belief.

Second, a warrant is normally a prerequisite to a search unless exigent circumstances make compliance with this requirement impossible. *Mincey* v. *Arizona,* 437 U. S. 385, 393–394 (1978). Yet, Public Law 22 requires no warrant, and none was obtained before appellant's bags were searched.[4]

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[3] The Commonwealth has not denied that it is subject to the constitutional prohibition against unreasonable searches. However, even an explicit concession on this point would not "'relieve this Court of the performance of the judicial function'" of deciding the issue. *Sibron* v. *New York,* 392 U. S. 40, 58 (1968), quoting *Young* v. *United States,* 315 U. S. 257, 258 (1942).

[4] Recently, we made clear that once a locked trunk was seized and impounded incident to an arrest there was no exigency justifying forcibly opening the locked trunk without a search warrant. *United States* v. *Chadwick,* 433 U. S. 1, 15 (1977). There was no suggestion in *Chadwick* and there is no suggestion here that the officers had grounds to believe that appellant's bags contained an "immediately dangerous instrumentality." See *id.,* at 15 n. 9.

IV

Apparently recognizing that the search of appellant's luggage pursuant to Public Law 22 cannot be sustained under our previous decisions, Puerto Rico urges us not to be bound in "the conceptual prison of *stare decisis.*" It suggests a novel exception to the normal Fourth Amendment requirements of a warrant and probable cause, referring us to decisions of this and other courts which have sustained (a) searches by the Border Patrol at a "functional equivalent" of the international border of the United States, (b) state inspections of shipments of goods in furtherance of health and safety regulations, (c) the use of airport metal detectors, and (d) certain searches on military bases. The Commonwealth asserts that these decisions recognize a variety of "intermediate borders," analogous to the international border of the United States, at which searches are permitted even though normal Fourth Amendment requirements are not satisfied.

Puerto Rico then asks us to recognize an "intermediate border" between the Commonwealth and the rest of the United States. In support of this proposal it points to its unique political status, and to the fact that its borders as an island are in fact international borders with respect to all countries except the United States. Finally, Puerto Rico urges that because of the seriousness of the problems created by an influx of weapons and narcotics, it should have the same freedom to search persons crossing its "intermediate border" as does the United States with respect to incoming international travelers.

The decisions on which Puerto Rico seeks to erect its theory of "intermediate boundaries" do not reflect any geographical element of Fourth Amendment doctrine, however, but are based on a variety of considerations which have no bearing on this case. Public Law 22 cannot be justified by any analogy to customs searches at a functional equivalent of the international border of the United States. The authority of the

United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry. *United States* v. *Ramsey*, 431 U. S. 606, 620 (1977); *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 272 (1973); *Carroll* v. *United States*, 267 U. S. 132, 154 (1925). Puerto Rico has no sovereign authority to prohibit entry into its territory; as with all international ports of entry, border and customs control for Puerto Rico is conducted by federal officers. Congress has provided by statute that Puerto Rico must accord to all citizens of the United States the privileges and immunities of its own residents. Act of Aug. 5, 1947, § 7, 61 Stat. 772, 48 U. S. C. § 737. See *Mullaney* v. *Anderson*, 342 U. S., at 419 n. 2.

Public Law 22 also may not be sustained by analogy to state inspection provisions designed to implement health and safety legislation. By a vote of four to three the Puerto Rico Supreme Court rejected appellee's attempt to characterize Public Law 22 as a health and safety measure, finding instead that it was enacted for the purpose of enforcing criminal laws. In any event, health and safety inspections are subject to the Fourth Amendment warrant requirement unless they fall within one of its recognized exceptions, and must be based on a "plan containing specific neutral criteria." *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312, 323 (1978).[5]

Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions

[5] Use of airport metal detectors with respect to passengers boarding aircraft and searches of persons entering military bases involve considerations not relevant to this case.

to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement. *Almeida-Sanchez* v. *United States, supra,* at 273–275; *United States* v. *Di Re,* 332 U. S. 581, 595 (1948).

In any event, Puerto Rico's law enforcement needs are indistinguishable from those of many states. Puerto Rico is not unique because it is an island; like Puerto Rico, neither Alaska nor Hawaii are contiguous to the continental body of the United States. Moreover, the majority of all the states have borders which coincide in part with the international frontier of the United States; virtually all have international airport facilities subject to federal customs controls.

We therefore hold that the search pursuant to Public Law 22 violated constitutional guarantees; accordingly, evidence obtained in the search of appellant's luggage should have been suppressed. The judgment of the Supreme Court of Puerto Rico is therefore reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, concurring in the judgment.

Appellant's conviction of violating the Puerto Rico Controlled Substances Act was based on evidence discovered when police, admittedly without probable cause, searched appellant's luggage after he arrived in Puerto Rico from Florida. The Supreme Court of Puerto Rico has construed Public Law 22 to authorize such searches without probable cause.*

*Four of the eight members of the Supreme Court of Puerto Rico were of the opinion that Public Law 22 as so construed violated the Fourth

I concur in the Court's holding that the Fourth Amendment applies in full force to Puerto Rico, that the search of appellant's luggage without a warrant based on probable cause violated the Fourth Amendment, that Public Law 22 is unconstitutional insofar as it purports to authorize what the Fourth Amendment prohibits, and that the evidence discovered in the unconstitutional search therefore must be suppressed.

Appellee concedes that the Fourth Amendment applies to the Commonwealth of Puerto Rico, Brief for Appellee 12, citing *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 668 n. 5 (1974). Whatever the validity of the old cases such as *Downes* v. *Bidwell*, 182 U. S. 244 (1901), *Dorr* v. *United States*, 195 U. S. 138 (1904), and *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Common-

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Amendment of the Federal Constitution. See *ante*, at 468. But Art. V, § 4, of the Puerto Rico Constitution provides that no law shall be held unconstitutional by the Supreme Court of Puerto Rico except by a majority of the total number of justices of which the court is composed. Appellant argues that this requirement violates the Supremacy Clause and the Due Process Clause of the Federal Constitution. In light of our resolution of the merits of appellant's search-and-seizure claim, we need not pass on these contentions. Cf. *Ohio ex rel. Bryant* v. *Akron Park Dist.*, 281 U. S. 74 (1930).

The Commonwealth's discussion of the impact of Art. V, § 4, on this case, however, implicitly suggests a claim that this "super-majority" provision constitutes an adequate and independent nonfederal ground supporting the judgment reached by the Puerto Rico Supreme Court. This cannot be. The provision neither supplies an independent substantive basis for the decision, nor controls the parties' conduct of the litigation. It affects only the internal "working rules" of the court. While such rules might affect the decision of cases, they cannot be adequate grounds in support of those decisions.

wealth of Puerto Rico in the 1970's. As Mr. Justice Black declared in *Reid* v. *Covert*, 354 U. S. 1, 14 (1957) (plurality opinion): "[N]either the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."

UNITED STATES v. HELSTOSKI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–349. Argued March 27, 1979—Decided June 18, 1979

During an investigation by several federal grand juries of reported political corruption, including allegations that aliens had paid money for the introduction of private bills in Congress to suspend the application of the immigration laws to allow the aliens to remain in the United States, respondent, then a Member of the House of Representatives, appeared voluntarily before the grand juries on 10 occasions. He testified as to his practices in introducing private immigration bills, voluntarily produced his files on numerous private bills, and provided copies of many such bills introduced on behalf of various aliens. Initially, respondent made no claim of privilege under the Fifth Amendment but eventually invoked that privilege as well as alluding to his privilege under the Speech or Debate Clause. Subsequently, respondent was indicted on charges of accepting money in return for being influenced in the performance of official acts, in violation of 18 U. S. C. § 201. He moved in District Court to dismiss the indictment on the ground, *inter alia*, that it violated the Speech or Debate Clause. The District Court denied the motion, holding that the Clause did not require dismissal, but that the Government was precluded from introducing evidence of past legislative acts in any form. The Court of Appeals affirmed this evidentiary ruling, holding, contrary to the Government's arguments, that legislative acts could not be introduced to show motive, since otherwise the protection of the Speech or Debate Clause would be negated, and that respondent had not waived the protection of that Clause by testifying before the grand juries.

Held: Under the Speech or Debate Clause, evidence of a legislative act of a Member of Congress may not be introduced by the Government in a prosecution under 18 U. S. C. § 201. *United States* v. *Brewster*, 408 U. S. 501; *United States* v. *Johnson*, 383 U. S. 169. Pp. 487–494.

(a) While the exclusion of evidence of past legislative acts undoubtedly will make prosecutions more difficult, nevertheless, the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts. References to legislative acts of a Member cannot be admitted without undermining the values protected by that Clause. Pp. 488–489.

(b) As to what restrictions the Clause places on the admission of evidence, the concern is with whether there is evidence of a legislative act; the protection of the Clause extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes is not "speech or debate" within the meaning of the Clause, nor is a promise to introduce a bill at some future date a legislative act. Pp. 489–490.

(c) Respondent did not waive the protection of the Clause by testifying before the grand juries and voluntarily producing documentary evidence of legislative acts. Assuming, without deciding, that a Member of Congress may waive the Clause's protection against being prosecuted for a legislative act, such waiver could be found only after explicit and unequivocal renunciation of the protection. On this record, respondent's words and conduct did not constitute such a waiver; his exchanges with the attorneys for the United States indicated at most a willingness to waive the protection of the Fifth Amendment. Pp. 490–492.

(d) Nor does 18 U. S. C. § 201 amount to a congressional waiver of the protection of the Speech or Debate Clause. Assuming, *arguendo*, that Congress could constitutionally waive the protection of the Clause for individual Members, such waiver could be shown only by an explicit and unequivocal legislative expression, and there is no evidence of such a waiver. Pp. 492–493.

576 F. 2d 511, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which STEWART, J., joined, *post*, p. 494. BRENNAN, J., filed a dissenting opinion, *post*, p. 498. POWELL, J., took no part in the consideration or decision of the case.

Solicitor General McCree argued the cause for the United States. With him on the brief were *Assistant Attorney General Heymann, Deputy Solicitor General Frey,* and *Louis M. Fischer.*

Morton Stavis argued the cause for respondent. With him on the briefs was *Louise Halper.*

Stanley M. Brand argued the cause for Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, et al. as *amici curiae.* With Mr. Brand on the brief was *Neal P. Rutledge.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to resolve important questions concerning the restrictions the Speech or Debate Clause [1] places on the admissibility of evidence at a trial on charges that a former Member of the House had, while a Member, accepted money in return for promising to introduce and introducing private bills.[2]

I

Respondent Helstoski is a former Member of the United States House of Representatives from New Jersey. In 1974, while Helstoski was a Member of the House, the Department of Justice began investigating reported political corruption, including allegations that aliens had paid money for the introduction of private bills which would suspend the application of the immigration laws so as to allow them to remain in this country.

The investigation was carried on before nine grand juries. The grand juries were called according to the regular practice in the District of New Jersey, which was to have a different grand jury sitting on each of six days during the week; on two days there was a second grand jury. When the United States Attorney was ready to present evidence, he presented it to whichever grand jury was sitting that day. There was therefore no assurance that any grand jury which voted an indictment would see and hear all of the witnesses or see all of the documentary evidence. It was contemplated that the grand jury that was asked to return an indictment would review

[1] The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6.

[2] This case was argued together with No. 78–546, *Helstoski* v. *Meanor*, *post*, p. 500, which involves the question of whether mandamus is an appropriate means of challenging the validity of an indictment on the ground that it violates the Speech or Debate Clause.

transcripts of relevant testimony presented to other grand juries.

Helstoski appeared voluntarily before grand juries on 10 occasions between April 1974 and May 1976. Each time he appeared, he was told that he had certain constitutional rights. Different terms were used by different attorneys for the United States, but the following exchange, which occurred at Helstoski's first appearance before a grand jury, fairly represents the several exchanges:

> "Q. You were told at that time [at the office of the United States Attorney earlier]—and just to repeat them today—before we begin you were told that you did not have to give any testimony to the Grand Jury or make any statements to any officer of the United States. You understand that, do you not?
>
> "A. I come with full and unlimited cooperation.
>
> "Q. I understand that. . . .
>
> . . . . . .
>
> "Q. And that you also know that anything that you may say to any agent of the United States or to this Grand Jury may later be used in a court of law against you; you understand that as well?
>
> [Affirmative response given.]
>
> . . . . . .
>
> "A. Whatever is in my possession, in my files, in its original form, will be turned over. Those files which I have—some of them are very, very old. I've been in Congress since 1965. We mentioned this.
>
> . . . . . .
>
> "Q. The Grand Jury wants from you simply the records that are in your possession, whether it be in your office in East Rutherford, New Jersey, Washington, D. C., your home, wherever they may be, the Grand Jury would like you to present those documents. Of course, you under-

stand that if you wish not to present those documents you do not have to and that anything you do present may also, as I have told you about your personal testimony, may be used against you later in a court of law?

"A. I understand that. Whatever I have will be turned over to you with full cooperation of [*sic*] this Grand Jury and with yourself, sir.

. . . . .

"A. I understand that. I promise full cooperation with your office, with the FBI, this Grand Jury.

"Q. The Grand Jury is appreciative of that fact. They also want to make certain that when you are giving this cooperation that you understand, as with anyone else that might be called before a United States Grand Jury, exactly what their constitutional rights are. And that is why I have gone through this step by step carefully so there will be no question and there will be no doubt in anybody's mind.

"A. As I indicated, I come with no request for immunity and you can be assured there won't be any plea of the Fifth Amendment under any circumstances."

Helstoski testified as to his practices in introducing private immigration bills, and he produced his files on numerous private bills. Included in the files were correspondence with a former legislative aide and with individuals for whom bills were introduced. He also provided copies of 169 bills introduced on behalf of various aliens.

Beginning with his fourth appearance before a grand jury, in October 1975, Helstoski objected to the burden imposed by the requests for information. The requests, he claimed, violated his own right of privacy and that of his constituents. In that appearance, he also stated that there were "some serious Constitutional questions" raised by the failure of the United States Attorney to return tax records which Helstoski had voluntarily delivered. He did not, however, assert a privilege

against producing documents until the seventh appearance, on December 12, 1975. Then he declined to answer questions, complaining that the United States Attorney had stated to the District Court that the grand jury had concluded that Helstoski had misapplied campaign funds. He asserted a general invocation of rights under the Constitution and specifically listed the Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments.

At the next, and eighth, appearance on December 29, 1975, he repeated his objections to the conduct of the United States Attorney. After answering questions about campaign financing, personal loans, and other topics, he declined to answer questions about the receipt of a sum of money. That action was based upon his privilege under the Fifth Amendment "and on further grounds that to answer that question would violate my rights under the Constitution."

Because the grand jury considered that Helstoski's invocation of constitutional privileges was too general to be acceptable, it adjourned and reconvened before the District Judge to seek a ruling on Helstoski's claim of privilege "under the Constitution." After questioning Helstoski, the judge stated that the privilege against compulsory self-incrimination was the only privilege available to Helstoski. The judge assisted Helstoski in wording a statement invoking the privilege that was satisfactory to the grand jury. Thereafter, Helstoski invoked his Fifth Amendment privilege in refusing to answer further questions, including a series of questions about private immigration bills.

Not until his ninth, and penultimate, appearance before a grand jury did Helstoski assert any privilege under the Speech or Debate Clause. On May 7, 1976, Helstoski asked if he was a target of the investigation. The prosecutor declined to answer the question, stating "it would be inappropriate for this Grand Jury or indeed for me to say that you are a target." Helstoski then invoked his privilege against compulsory self-

incrimination and declined to answer further questions or to produce documents.[3] He also declined to produce a copy of an insert from the Congressional Record, saying "I consulted with my attorneys and based on the statement that was made on the floor, I don't have any right to be questioned at any other time or place as reference to statements made on the floor of Congress."

Although that was the first instance which can even remotely be characterized as reliance upon the Speech or Debate Clause, Helstoski earlier had indicated an awareness of another aspect of the constitutional privileges afforded Congressmen.[4] During his fourth appearance before a grand jury, in October 1975, Helstoski complained that he had been served with a subpoena directing him to appear before a grand jury on a day that Congress was in session.[5]

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[3] That Helstoski may not have had the extent of his privilege clearly in mind is indicated by the following exchange between him and an Assistant United States Attorney during Helstoski's ninth appearance before a grand jury:

"A. [Helstoski] I stand on my Constitutional privilege regarding the Fifth Amendment.

"Q. And that privilege is against self incrimination?

"A. Whatever the Fifth Amendment is."

[4] The District Court found that "Helstoski was aware of the Speech or Debate Clause at the time he made his first grand jury appearance. He had recently concluded litigation involving his franking privilege in which he had relied upon the Speech or Debate Clause. *Schiaffo* v. *Helstoski*, 350 F. Supp. 1076 (D. N. J. 1972), rev'd in part, aff'd in part and remanded, 492 F. 2d 413 (3d Cir. 1974). In that litigation, Helstoski was represented by the same attorney who represented him throughout his grand jury appearances."

[5] He offered this explanation to an Assistant United States Attorney:

"A. [Helstoski] Do you want to get into the Constitutional question of whether or not you could serve a member of Congress while Congress is in session?

"You know very well that can't be done . . . .

[*Footnote 5 is continued on p. 484*]

At his 10th, and final, appearance before a grand jury, Helstoski invoked his Fifth Amendment privilege. But he also referred repeatedly to "other constitutional privileges which prevail." Nevertheless, he continued to promise to produce campaign and personal financial records as requested by the grand jury and directed by the District Judge.

II

In June 1976, a grand jury returned a multiple-count indictment charging Helstoski and others with various criminal acts. Helstoski moved to dismiss the indictment, contending that the grand jury process had been abused and that the indictment violated the Speech or Debate Clause.

The District Judge denied the motion after examining a transcript of the evidence presented to the indicting grand jury. He held that the Speech or Debate Clause did not require dismissal. He also ruled that the Government would not be allowed to offer evidence of the actual performance of any legislative acts. That ruling prompted the Government to file a motion requesting that the judge pass on the admissibility of 23 categories of evidence. The Government urged that a ruling was necessary to avoid the possibility of a mistrial. Helstoski opposed the motion, arguing that the witnesses would not testify as the Government indicated in its proffer.

The District Judge declined to rule separately on each of the categories. Instead, he ordered:

> "The United States may not, during the presentation of its case-in-chief at the trial of [this] Indictment, introduce evidence of the *performance of a past legislative*

"Q. Congressman, you've used the term 'illegal subpoena.' Who told you it was illegal?

"A. That's my own judgment based on the Constitution and the Rules of Procedure of the House of Representatives."

> *act* on the part of the defendant, Henry Helstoski, derived from any source and for any purpose." (Emphasis added.)

The Government filed a timely appeal from the evidentiary ruling, relying upon 18 U. S. C. § 3731:

> "An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> "The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> . . . . .
>
> "The provisions of this section shall be liberally construed to effectuate its purposes."

The Court of Appeals affirmed the District Court's evidentiary ruling. 576 F. 2d 511 (CA3 1978). It first concluded that an appeal was proper under § 3731, relying primarily upon its earlier decision in *United States* v. *Beck*, 483 F. 2d 203 (1973), cert. denied, 414 U. S. 1132 (1974), and upon the language in the section mandating that it be "liberally construed."

Turning to the merits of the Government's appeal, the Court of Appeals rejected both of the Government's arguments: (a) that legislative acts could be introduced to show motive; and (b) that legislative acts could be introduced because Helstoski had waived his privilege by testifying before the grand juries. The court relied upon language in *United States* v. *Brewster*, 408 U. S. 501, 527 (1972), prohibiting the introduction of evidence as to how a Congressman acted on, voted on, or resolved

a legislative issue. The court reasoned that to permit evidence of such acts under the guise of showing motive would negate the protection afforded by the Speech or Debate Clause.

In holding Helstoski had not waived the protection of the Speech or Debate Clause, the Court of Appeals did not decide whether the protection could be waived. Rather, it assumed that a Member of Congress could waive the privilege, but held that any waiver must be "express and for the specific purpose for which the evidence of legislative acts is sought to be used against the member." 576 F. 2d, at 523–524. Any lesser standard, the court reasoned, would frustrate the purpose of the Clause. Having found on the record before it that no waiver was shown, it affirmed the District Court order under which the Government is precluded from introducing evidence of past legislative acts in any form.

In seeking review of the judgment of the Court of Appeals, the Government contends that the Speech or Debate Clause does not bar the introduction of all evidence referring to legislative acts. It concedes that, absent a waiver, it may not introduce the bills themselves. But the Government argues that the Clause does not prohibit it from introducing evidence of discussions and correspondence which describe and refer to legislative acts if the discussions and correspondence did not occur during the legislative process. The Government contends that it seeks to introduce such evidence to show Helstoski's motive for taking money, not to show his motive for introducing the bills. Alternatively, the Government contends that Helstoski waived his protection under the Speech or Debate Clause when he voluntarily presented evidence to the grand juries. Volunteered evidence, the Government argues, is admissible at trial regardless of its content.

Finally, the Government argues, by enacting 18 U. S. C. § 201, Congress has shared its authority with the Executive and the Judiciary by express delegation authorizing the indict-

ment and trial of Members who violate that section—in short an institutional decision to waive the privilege of the Clause.

III

The Court's holdings in *United States* v. *Johnson*, 383 U. S. 169 (1966), and *United States* v. *Brewster*, *supra*, leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution under § 201.[6] In *Johnson* there had been extensive questioning of both Johnson, a former Congressman, and others about a speech which Johnson had delivered in the House of Representatives and the motive for the speech. The Court's conclusion was unequivocal:

> "We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it." 383 U. S., at 177.

In *Brewster*, we explained the holding of *Johnson* in this way:

> "*Johnson* thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely

[6] We agree with the Court of Appeals that 18 U. S. C. § 3731 authorized the Government to appeal the District Court order restricting the evidence that could be used at trial. All of the requisites of § 3731 were met. There was an order of a District Court excluding evidence; a United States Attorney filed the proper certification; and the appeal was taken within 30 days. In *United States* v. *Wilson*, 420 U. S. 332, 337 (1975), we concluded that the purpose of the section was "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." See also *United States* v. *Scott*, 437 U. S. 82, 84–85 (1978); H. R. Conf. Rep. No. 91–1768, p. 21 (1970); S. Rep. No. 91–1296, pp. 2–3 (1970); 116 Cong. Rec. 35659 (1970) (remarks of Sen. Hruska). There are no constitutional barriers to this appeal, and we conclude that the appeal was authorized by § 3731.

> on legislative acts or the motivation for legislative acts. A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." 408 U. S., at 512.

The Government, however, argues that exclusion of references to past legislative acts will make prosecutions more difficult because such references are essential to show the motive for taking money. In addition, the Government argues that the exclusion of references to past acts is not logically consistent. In its view, if jurors are told of promises to perform legislative acts they will infer that the acts were performed, thereby calling the acts themselves into question.

We do not accept the Government's arguments; without doubt the exclusion of such evidence will make prosecutions more difficult. Indeed, the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts.[7]

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[7] MR. JUSTICE STEVENS suggests that our holding is broader than the Speech or Debate Clause requires. In his view, "it is illogical to adopt rules of evidence that will allow a Member of Congress effectively to immunize himself from conviction [for bribery] simply by inserting references to past legislative acts in all communications, thus rendering all such evidence inadmissible." *Post*, at 498. Nothing in our opinion, by any conceivable reading, prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible. This is a familiar process in the admission of documentary evidence. Of course, a Member can use the Speech or Debate Clause as a shield against prosecution by the Executive Branch, but only for utterances within the scope of legislative acts as defined in our holdings. That is the clear purpose of the Clause. The Clause is also a shield for libel, and beyond doubt it "has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers." *United States* v. *Brewster*, 408 U. S. 501, 516 (1972). Nothing in our holding today, however, immunizes

The Clause protects "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Id.*, at 525. It "precludes any showing of how [a legislator] acted, voted, or decided." *Id.*, at 527. Promises by a Member to perform an act in the future are not legislative acts. *Brewster* makes clear that the "compact" may be shown without impinging on the legislative function. *Id.*, at 526.

We therefore agree with the Court of Appeals that references to past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause. We implied as much in *Brewster* when we explained: "To make a prima facie case under [the] indictment, the Government need not show any act of [Brewster] *subsequent* to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act." *Ibid.* (Emphasis altered.) A similar inference is appropriate from *Johnson* where we held that the Clause was violated by questions about motive addressed to others than Johnson himself. That holding would have been unnecessary if the Clause did not afford protection beyond legislative acts themselves.

MR. JUSTICE STEVENS misconstrues our holdings on the Speech or Debate Clause in urging: "The admissibility line should be based on the purpose of the offer rather than the specificity of the reference." *Post*, at 496. The Speech or Debate Clause does not refer to the prosecutor's purpose in offering evidence. The Clause does not simply state, "No proof of a legislative act shall be *offered*"; the prohibition of the Clause is far broader. It provides that Members "shall not be *questioned* in any other Place." Indeed, as MR. JUSTICE STEVENS recognizes, the admission of evidence of legislative acts "may reveal [to the jury] some information about the performance of legislative acts and the legislator's motivation

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a Member from punishment by the House or the Senate by disciplinary action including expulsion from the Member's seat.

in conducting official duties." *Post,* at 496. Revealing information as to a legislative act—speaking or debating—to a jury would subject a Member to being "questioned" in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.

As to what restrictions the Clause places on the admission of evidence, our concern is not with the "specificity" of the reference. Instead, our concern is whether there is mention of a legislative act. To effectuate the intent of the Clause, the Court has construed it to protect other "legislative acts" such as utterances in committee hearings and reports. *E. g., Doe* v. *McMillan,* 412 U. S. 306 (1973). But it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not "speech or debate." Likewise, a *promise* to introduce a bill is not a legislative act. Thus, in light of the strictures of *Johnson* and *Brewster,* the District Court order prohibiting the introduction of evidence "of the performance of a *past* legislative act" was redundant.

The Government argues that the prohibition of the introduction of evidence should not apply in this case because the protections of the Clause have been waived. The Government suggests two sources of waiver: (a) Helstoski's conduct and utterances, and (b) the enactment of 18 U. S. C. § 201 by Congress. The Government argues that Helstoski waived the protection of the Clause by testifying before the grand juries and voluntarily producing documentary evidence of legislative acts. The Government contends that Helstoski's conduct is sufficient to meet whatever standard is required for a waiver of that protection. We cannot agree.

Like the District Court and the Court of Appeals, we perceive no reason to decide whether an individual Member may waive the Speech or Debate Clause's protection against being prosecuted for a legislative act. Assuming that is possible.

we hold that waiver can be found only after explicit and unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting. See generally *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938) ("intentional relinquishment or abandonment of a known right or privilege"); *Garner* v. *United States,* 424 U. S. 648, 654 n. 9, 657 (1976).

The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government. The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities. The importance of the principle was recognized as early as 1808 in *Coffin* v. *Coffin,* 4 Mass. 1, 27, where the court said that the purpose of the principle was to secure to every member "*exemption* from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office." (Emphasis added.)

This Court has reiterated the central importance of the Clause for preventing intrusion by Executive and Judiciary into the legislative sphere.

> "[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.
>
> . . . . .
>
> "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech

or Debate Clause." *United States* v. *Johnson*, 383 U. S., at 180–181, 182.

We reaffirmed that principle in *Gravel* v. *United States*, 408 U. S. 606, 618 (1972), when we noted that the "fundamental purpose" of the Clause was to free "the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."

On the record before us, Helstoski's words and conduct cannot be seen as an explicit and unequivocal waiver of his immunity from prosecution for legislative acts—assuming such a waiver can be made. The exchanges between Helstoski and the various United States Attorneys indeed indicate a willingness to waive the protection of the Fifth Amendment; but the Speech or Debate Clause provides a separate, and distinct, protection which calls for at least as clear and unambiguous an expression of waiver. No such showing appears on this record.

The Government also argues that there has been a sort of institutional waiver by Congress in enacting § 201. According to the Government, § 201 represents a collective decision to enlist the aid of the Executive Branch and the courts in the exercise of Congress' powers under Art. I, § 5, to discipline its Members. This Court has twice declined to decide whether a Congressman could, consistent with the Clause, be prosecuted for a legislative act as such, provided the prosecution were "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *Johnson, supra*, at 185. *United States* v. *Brewster*, 408 U. S., at 529 n. 18. We see no occasion to resolve that important question. We hold only that § 201 does not amount to a congressional waiver of the protection of the Clause for individual Members.

We recognize that an argument can be made from precedent and history that Congress, as a body, should not be free to strip individual Members of the protection guaranteed by the

Clause from being "questioned" by the Executive in the courts. The controversy over the Alien and Sedition Acts reminds us how one political party in control of both the Legislative and the Executive Branches sought to use the courts to destroy political opponents.

The Supreme Judicial Court of Massachusetts noted in *Coffin* that "the privilege secured . . . is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, *even against the declared will of the house.*" 4 Mass., at 27 (emphasis added). In a similar vein in *Brewster* we stated:

> "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by *insuring the independence of individual legislators.*" 408 U. S., at 507 (emphasis added).

See also *id.*, at 524. We perceive no reason to undertake, in this case, consideration of the Clause in terms of separating the Members' rights from the rights of the body.

Assuming, *arguendo*, that the Congress could constitutionally waive the protection of the Clause for individual Members, such waiver could be shown only by an explicit and unequivocal expression. There is no evidence of such a waiver in the language or the legislative history of § 201 or any of its predecessors.[8]

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[8] Section 201 was enacted in 1962. Pub. L. 87–849, 76 Stat. 1119. It replaced a section that had remained unchanged since its original enactment in 1862. Ch. 180, 12 Stat. 577. See Rev. Stat. § 1781; 18 U. S. C. § 205 (1958 ed.). The debates on the 1862 Act reveal no discussion of the speech or debate privilege. See, *e. g.*, Cong. Globe, 37th Cong., 2d Sess., 3260 (1862). As explained in the House Report accompanying the 1962 Act, the purpose of the Act was "to render uniform the law describing a bribe and prescribing the intent or purpose which makes its transfer unlawful." H. R. Rep. No. 748, 87th Cong., 1st Sess., 15 (1961). The

We conclude that there was neither individual nor institutional waiver and that the evidentiary barriers erected by the Speech or Debate Clause must stand. Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

The Court holds that *United States* v. *Brewster*, 408 U. S. 501, and *United States* v. *Johnson*, 383 U. S. 169, preclude the Government from introducing evidence of a legislative act by a Member of Congress. I agree that those cases do prevent the prosecution from attempting to prove that a legislative act was performed. I do not believe, however, that they require rejection of evidence that merely refers to legislative acts when that evidence is not offered for the purpose of proving the legislative act itself.

In *Johnson*, the Court held that a Member of Congress could not be prosecuted for conspiracy against the United States based on his preparation and delivery of an improperly motivated speech in the House of Representatives. After noting that the attention given to the speech was not merely "an incidental part of the Government's case," but rather was "an intensive judicial inquiry" into the speech's substance and motivation, *id.*, at 176–177, the Court held that the prosecu-

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Senate Report expanded the explanation and said that a purpose of the Act was the "substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery. This consolidation would make no significant changes of substance and, more particularly, would not restrict the broad scope of the present bribery statutes as construed by the courts." S. Rep. No. 2213, 87th Cong., 2d Sess., 4 (1962).

tion violated the express language of the Speech or Debate Clause and the policies that underlie it. The Court carefully emphasized, however, that its decision was limited to a case of that character and "does not touch a prosecution which . . . does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.*, at 185.

In *Brewster*, the Court held that the Speech or Debate Clause did not bar prosecution of a former Senator for receiving money in return for being influenced in the performance of a legislative act. The Court read *Johnson* as allowing a prosecution of a Member of Congress so long as the Government's case does not rely on legislative acts or the motivation for such acts. It reasoned that Brewster was not being prosecuted for the performance of a legislative act, but rather for soliciting or agreeing to take money with knowledge that the donor intended to compensate him for an official act. Whether the Senator ever performed the official act was irrelevant.

As a practical matter, of course, it is clear that evidence relating to a legislator's motivation for accepting a bribe will also be probative of his intent in committing the official act for which the bribe was solicited or paid. Nonetheless, the Court made clear in *Brewster* that inquiries into the legislator's motivation in accepting payment are not barred by *Johnson*'s proscription against inquiry into legislative motivation. "[A]n inquiry into the purpose of a bribe," the *Brewster* Court held, " 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.' " 408 U. S., at 526, quoting *Johnson, supra*, at 185. Thus, so long as the Government's case does not depend upon the legislator's motivation in committing an official act, inquiries into his motivation in accepting a bribe—which obviously may be revealing as to both the existence of legislative acts and the motivation for

them—are permissible under the Speech or Debate Clause, as interpreted in *Brewster*.

Brewster's recognition of this distinction, in my judgment, provides strong support for the Government's argument in this case. Here, the Government is seeking to introduce written and testimonial evidence as to Helstoski's motivation in soliciting and accepting bribes. Some of this evidence makes reference to past or future legislative acts for which payment is being sought or given. Obviously, this evidence, to the extent it is probative of Helstoski's intent in accepting payment, is an important and legitimate part of the Government's case against the former Congressman. Whether or not he ever committed the legislative acts is wholly irrelevant to the Government's proof, and inquiry into that subject is prohibited by *Johnson* and *Brewster*. But the mere fact that legislative acts are mentioned does not, in my view, require that otherwise relevant and admissible evidence be excluded. The acts may or may not have been performed; the statements in the letters may be true or false. The existence of the statements does not establish that legislative acts were performed; nor does it constitute inquiry into those acts. To be sure, such statements may reveal some information about the performance of legislative acts and the legislator's motivation in conducting official duties. However, that is also true of other evidence making no reference to specific past legislative acts, but rather dealing only with promises of future performance or less specific commitments to legislative action. *Brewster* establishes that such evidence is admissible in bribery prosecutions because it does not draw in question the legislative act itself or its motivation. The admissibility line should be based on the purpose of the offer rather than the specificity of the reference. So long as the jury is instructed that it should not consider the references as proof of legislative acts, and so long as no inquiry is made with respect to the motivations for such acts, *Brewster* does not bar the intro-

duction of evidence simply because reference is made to legislative acts.*

Indeed, I think it important to emphasize that the majority today does not read *Brewster* to foreclose the introduction of any evidence making reference to legislative acts. The Court holds that evidence referring only to acts to be performed in the future may be admitted into evidence. *Ante*, at 490. The Court explains this holding by noting that a promise to perform a legislative act in the future is not itself a legislative act. But it is equally true that the solicitation of a bribe which contains a self-laudatory reference to past performance is not itself a legislative act. Whether the legislator refers to past or to future performance, his statement will be probative of his intent in accepting payment and, in

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*In reaching this conclusion, I have not overlooked the language in *Brewster*, relied upon by respondent, that "*Johnson* precludes any showing of how [Brewster] acted, voted, or decided." 408 U. S., at 527. Taken out of context, that language would appear to support Helstoski's claim that all references to legislative action are inadmissible. When placed in its proper context, however, it clearly does not.

The quoted statement was made with respect to the dissent's argument that criminal prosecution should not be permitted since the indictment charged the offense as being in part linked to Brewster's "action, vote and decision on postage rate legislation." In response, the Court pointed out that, while this was true, "[t]he Government, as we have noted, need not *prove* any specific act, speech, debate, or decision to establish a violation of the statute under which appellee was indicted. To accept the arguments of the dissent would be to retreat from the Court's position in *Johnson* that a Member may be convicted if no showing of legislative act is *required*." *Id.*, at 528 (emphasis added). When placed in this context, I think it clear that the statement relied upon by respondent should be read only as establishing—as *Johnson* itself held, and as the *Brewster* Court read *Johnson*—that a Member of Congress may not be prosecuted if proof of a specific legislative act would be required as an element of the Government's case. The recognition by the Court today that evidence referring to future legislative actions *is* admissible, see *ante*, at 490, itself is a rejection of the broad reading respondent attaches to "any showing."

either event, may incidentally shed light on the performance and motivation of legislative acts. The proper remedy, in my judgment, is not automatic inadmissibility for past references and automatic admissibility for future references. Rather, drawing on the language of the Constitution itself, the test should require the trial court to analyze the purpose of the prosecutor's questioning. If the evidentiary references to legislative acts are merely incidental to a proper purpose, the judge should admit the evidence and instruct the jury as to its limited relevance. The Constitution mandates that legislative acts "shall not be questioned"; it does not say they shall not be mentioned.

The Court properly notes that the Government has no valid complaint simply because application of the Speech or Debate Clause renders some prosecution of Members of Congress "difficult." *Ante*, at 488. But I do not believe the Clause was intended to make such prosecution virtually impossible. In light of the Court's holding in *Brewster* that bribery prosecutions are permissible, it is illogical to adopt rules of evidence that will allow a Member of Congress effectively to immunize himself from conviction simply by inserting references to past legislative acts in all communications, thus rendering all such evidence inadmissible. Because I believe the exclusionary rule the Court applies today affords greater protection than is necessary to fulfill the mission of the Speech or Debate Clause, I respectfully dissent to the limited extent indicated above.

MR. JUSTICE BRENNAN, dissenting.

While I have no quarrel with the Court's decision to limit the evidence which the Government may introduce at Helstoski's trial, I would go much further and order the dismissal of Helstoski's indictment altogether. "[P]roof of an agreement to be 'influenced' in the performance of legislative acts is by definition an inquiry into their motives, whether or

not the acts themselves or the circumstances surrounding them are questioned at trial." *United States* v. *Brewster*, 408 U. S. 501, 536 (1972) (BRENNAN J., dissenting). I continue to adhere to the view expressed in my dissent in *Brewster*, and would hold that "a corrupt agreement to perform legislative acts, even if provable without reference to the acts themselves, may not be the subject of a general conspiracy prosecution." *Id.*, at 539.

HELSTOSKI *v.* MEANOR, UNITED STATES DISTRICT JUDGE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-546. Argued March 27, 1979—Decided June 18, 1979

Petitioner, then a Member of Congress, was indicted in 1976 for conspiring to solicit and accept, and for soliciting and accepting, bribes in return for being influenced in the performance of official acts, namely, the introduction of certain private bills in the House of Representatives. He moved in District Court to dismiss the indictment on the ground, *inter alia*, that the indictment violated the Speech or Debate Clause of the Constitution because the grand jury had heard evidence of legislative acts, but the motion was denied. Thereafter, he petitioned the Court of Appeals for the Third Circuit for a writ of mandamus directing the District Court to dismiss the indictment. The court declined to issue the writ, holding that the indictment did not violate the Speech or Debate Clause.

Held: Mandamus was not the appropriate means of challenging the validity of the indictment on the ground that it violated the Speech or Debate Clause. Direct appeal to the Court of Appeals was available and was the proper course. Pp. 505–508.

(a) Once the motion to dismiss the indictment was denied, there was nothing further petitioner could do under the Speech or Debate Clause in the trial court to prevent the trial, and an appeal of the ruling was clearly available. Cf. *Abney* v. *United States*, 431 U. S. 651. Pp. 506–507.

(b) The Speech or Debate Clause was designed to protect Congressmen "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U. S. 82, 85. Pp. 507–508.

(c) If a Member of Congress "is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the [Speech or Debate] Clause his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs." *Abney*, *supra*, at 662. P. 508.

(d) Petitioner cannot be viewed as being penalized for failing to anticipate the decision in *Abney*, since the controlling law of the Third

Circuit was announced at the time of the District Court's order denying dismissal of the indictment, see *United States* v. *DiSilvio*, 520 F. 2d 247, and the holding in *Abney* did no more than affirm the correctness of that holding. P. 508.

576 F. 2d 511, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 508. POWELL, J., took no part in the consideration or decision of the case.

Morton Stavis argued the cause for petitioner. With him on the briefs was *Louise Halper*.

Solicitor General McCree argued the cause for respondents. With him on the brief were *Assistant Attorney General Heymann*, *Deputy Solicitor General Frey*, and *Louis M. Fischer*.

Stanley M. Brand argued the cause for Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, et al. as *amici curiae*. With Mr. Brand on the brief was *Neal P. Rutledge*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question in this case is whether mandamus is an appropriate means of challenging the validity of an indictment of a Member of Congress on the ground that it violates the Speech or Debate Clause of the Constitution.[1] The Court of Appeals declined to issue the writ. We affirm.

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[1] The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6.

This case was argued together with No. 78-349, *United States* v. *Helstoski*, *ante*, p. 477, which concerns the restrictions the Speech or Debate Clause places on the admissibility of evidence at a trial on charges that a former Member of the House accepted money in return for promising to introduce and introducing private bills.

I

Petitioner Helstoski served in the United States Congress from 1965 through 1976 as a Representative from New Jersey. In 1974, the Department of Justice began investigating reported political corruption, including allegations that aliens had paid money for the introduction and processing of private bills which would suspend the application of the immigration laws so as to allow them to remain in this country.

In June 1976, a grand jury returned a 12-count indictment charging Helstoski and others with various criminal acts. Only the first four counts are involved in this case. The first count charged that Helstoski and others had conspired to violate 18 U. S. C. § 201 (c)(1) by accepting money in return for Helstoski's "being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives." The charge recited 16 overt acts, 4 of which referred to the actual introduction of private bills; a 5th referred to an agreement to introduce a private bill. The entire conspiracy was charged as a violation of the general conspiracy statute, 18 U. S. C. § 371.

Counts II, III, and IV were substantive counts charging violations of 18 U. S. C. §§ 201 (c)(1) and (2):

> "Whoever, being a public official[,] directly or indirectly, corruptly *asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive* anything of value for himself or for any other person or entity, in return for:
>
> "(1) being influenced in his performance of any official act; or
>
> "(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States;
>
> . . . . .
>
> "Shall be fined . . . or imprisoned." (Emphasis added.)

"Public official" and "official act" are defined in 18 U. S. C. § 201:

> "(a) For the purpose of this section:
>
> " 'public official' means Member of Congress . . . ; and
>
> . . . . .
>
> " 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

Each count charged that Helstoski, acting through his legislative aide, had solicited money from aliens in return for "being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on behalf of" the aliens. Essentially, the charges against Helstoski parallel those dealt with in *United States* v. *Johnson*, 383 U. S. 169 (1966), and *United States* v. *Brewster*, 408 U. S. 501 (1972).

Each count also charged that Helstoski, again acting through his aide, had accepted a bribe "in return for his being influenced in the performance of official acts, to wit: the introduction of private bills in the United States House of Representatives on behalf of" the aliens. Finally, each count charged that a private bill had been introduced on a particular date.

Helstoski neither appeared before nor submitted material to the particular grand jury that returned the indictment. The prosecutor provided that grand jury with transcripts of most, but not all, of the testimony of witnesses, including Helstoski, before eight other grand juries.[2] The United States Attorney explained that to avoid any possible prejudice to Helstoski he had not told the ninth grand jury of Helstoski's invocation of his privilege under the Fifth Amendment. Moreover, he

[2] The proceedings before the various grand juries are described in *United States* v. *Helstoski*, *ante*, p. 477.

sought to avoid any challenge resulting from the fact that the District Judge had appeared before one grand jury to rule on Helstoski's claim of that privilege.

Helstoski moved to dismiss the indictment, contending that the grand jury process had been abused and that the indictment violated the Speech or Debate Clause. He supported his allegation of abuse of the grand jury by characterizing the eight grand juries as "discovery tools." The effect, he contended, was to permit the prosecutor to select the information presented to the indicting grand jury and to deprive that grand jury of evidence of the demeanor of witnesses, especially that of Helstoski himself.

District Judge Meanor denied the motion after examining a transcript of the evidence presented to the indicting grand jury. He held that there had been no such abuse to justify invalidating the indictment. He found that most of the material not submitted to the indicting grand jury "was either prejudicial to the defendants, or neither inculpating nor exculpating in nature." He also found that the testimony of two grand jury witnesses should have been presented to the indicting grand jury and concluded that *Brady* v. *Maryland*, 373 U. S. 83 (1963), required that the Government provide Helstoski with transcripts of their testimony. Judge Meanor also held that the Speech or Debate Clause did not require dismissal.

Approximately three months later, in June 1977, Helstoski petitioned the Court of Appeals for a writ of mandamus directing the District Court to dismiss the indictment.

The Court of Appeals declined to issue the writ of mandamus. 576 F. 2d 511 (CA3 1978). It concluded that the indictment in this case was indistinguishable from that in *United States* v. *Brewster, supra,* where an indictment was held not to violate the Speech or Debate Clause even though it contained references to legislative acts. The Court of Appeals rejected Helstoski's argument that the indictment was invalid because the grand jury had heard evidence of legisla-

tive acts, which he argued was in violation of the Speech or Debate Clause. The court declined to go behind the indictment, holding that it was valid on its face.

In seeking reversal here of the Court of Appeals holding, Helstoski argues that the extraordinary remedy of mandamus is appropriate in this case to protect the constitutional command of separation of powers. He contends that the Speech or Debate Clause assigns exclusive jurisdiction over all legislative acts to Congress. The indictment itself, he urges, is a violation of that Clause because it represents an impermissible assertion of jurisdiction over the legislative function by the grand jury and the federal courts. He challenges the validity of the indictment on two grounds. First, the indictment itself refers to legislative acts. Any attempt at restricting the proof at trial, as approved by the Court of Appeals, will amount to an amendment of the indictment, thereby violating a Fifth Amendment right to be tried only on an indictment in precisely the form issued by a grand jury. Second, he contends the Speech or Debate Clause was violated when the grand jury was allowed to consider evidence of his legislative acts notwithstanding that such evidence and testimony was presented by him.

II

Almost 100 years ago, this Court explained: "The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it.* It lies only when there is practically *no other remedy.*" *Ex parte Rowland,* 104 U. S. 604, 617 (1882) (emphasis added). More recently we summarized certain considerations for determining whether the writ should issue:

> "Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, and that he satisfy 'the burden of showing that [his] right to issuance of the writ is "clear and indisputa-

ble.'" Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr* v. *United States District Court*, 426 U. S. 394, 403 (1976) (citations omitted).

Helstoski contends that his petition for a writ of mandamus should not be governed by the rules which we have developed for assessing mandamus petitions generally. He argues that the writ is especially appropriate for enforcing the commands of the Speech or Debate Clause. We agree that the guarantees of that Clause are vitally important to our system of government and therefore are entitled to be treated by the courts with the sensitivity that such important values require. We are unwilling, however, to accept the contention that mandamus is the appropriate vehicle for assuring protection of the Clause in the circumstances shown here. Helstoski could readily have secured review of the ruling complained of and all objectives now sought, by direct appeal to the Court of Appeals from the District Court order denying his motion to dismiss the indictment.

Only recently in *Abney* v. *United States*, 431 U. S. 651 (1977), we held that "pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of [28 U. S. C.] § 1291." *Id.*, at 662. The reasoning undergirding that holding applies with particular force here. The language of the *Abney* opinion is particularly apt, even though the context was the Double Jeopardy Clause:

> "[T]here can be no doubt that such orders constitute a complete, formal and, in the trial court, final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." *Id.*, at 659.

This is equally true for a claim that an indictment violates the fundamental guarantees of the Speech or Debate Clause. Once a motion to dismiss is denied, there is nothing the Member can do under that Clause in the trial court to prevent the trial; but it is equally clear an appeal of the District Court ruling was available.

Second, we noted:

> "[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. Rather, he is contesting *the very authority of the Government to hale him into court to face trial on the charge against him.*"[3] *Ibid.* (Emphasis added; citations omitted.)

Abney concludes:

> "[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. . . . [T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Id.*, at 660–661.

That characterization of the purpose of the Double Jeopardy

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[3] It is true that Helstoski challenges the admissibility of evidence at his trial; that challenge, however, is raised only if the indictment is allowed to stand.

Clause echoed this Court's statement in *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967), that the Speech or Debate Clause was designed to protect Congressmen "not only from the consequences of litigation's results but also from the burden of defending themselves."

Here, the holding of *Abney* becomes highly relevant; by analogy, if a Member "is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs." *Abney, supra*, at 662.

Helstoski argues that he should not be penalized for failing to predict our decision in *Abney*. But he cannot be viewed as being penalized since the controlling law of the Third Circuit was announced at the time of the District Court order denying dismissal of the indictment, and our holding did no more than affirm the correctness of the law of that Circuit. See *United States* v. *DiSilvio*, 520 F. 2d 247, 248 n. 2a (CA3), cert. denied, 423 U. S. 1015 (1975). The relevance of the *Abney-DiSilvio* holdings, read in light of *Dombrowski* v. *Eastland, supra*, was predictable. We hold that if Helstoski wished to challenge the District Court's denial of his motion to dismiss the indictment, direct appeal to the Court of Appeals was the proper course under *DiSilvio, supra*.[4]

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, dissenting.

In today's decision, the Court professes to "agree that the guarantees of [the Speech or Debate] Clause are vitally important to our system of government and therefore are en-

[4] If the petition for a writ of mandamus were treated as an appeal it would, of course, have been jurisdictionally out of time. Fed. Rule App. Proc. 4.

titled to be treated by the courts with the sensitivity that such important values require." *Ante*, at 506. Nonetheless, it refuses to hold mandamus an appropriate vehicle for assuring the protections of the Clause because "Helstoski could readily have secured review of the ruling complained of and all objectives now sought, by direct appeal to the Court of Appeals from the District Court order denying his motion to dismiss the indictment." *Ibid.*

Mr. Helstoski may well be excused if he views the Court's holding as if it were a line out of Joseph Heller's "Catch-22." He cannot utilize mandamus because he should have sought a direct appeal. But he cannot seek a direct appeal, because that avenue is time barred. *Ante*, at 508 n. 4. Of course, the dilemma could have been short-circuited had Helstoski brought an immediate appeal at the time his motion for dismissal of the indictment was denied. Unfortunately, he could not have known that avenue of relief was available until today—for we have never before held that the denial of a claim that an indictment violates the Speech or Debate Clause is an exception to the longstanding rule forbidding interlocutory appeals.* And, as the Court holds, today it is too late. Values as "vitally important" as those guaranteed by the Speech or Debate Clause are entitled to more sensitive treatment.

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*The Court makes the surprising assertion that Helstoski should have anticipated today's holding on the basis of a footnote in a 1975 Third Circuit opinion dealing with a different issue. (That opinion, like this Court's decision in *Abney* v. *United States*, 431 U. S. 651 (1977), was limited to the double jeopardy issue. *Abney* was announced far too late to have helped the defendant.) Although I agree with the Court's extension of the *Abney* principle from double jeopardy claims to those based upon the Speech or Debate Clause, I do not regard the extension as obvious. Nor, apparently, does the Government, as it carefully refrains from endorsing that view. See Brief for United States 92. I certainly would not use it as a basis for penalizing a former Congressman in his assertion of a principle so "vitally important to our system of government." *Ante*, at 506.

SANDSTROM *v.* MONTANA

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 78–5384. Argued April 18, 1979—Decided June 18, 1979

Based upon a confession and other evidence, petitioner was charged under a Montana statute with "deliberate homicide," in that he "purposely or knowingly" caused the victim's death. At trial, petitioner argued that, although he killed the victim, he did not do so "purposely or knowingly," and therefore was not guilty of deliberate homicide. The trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," over petitioner's objection that such instruction had the effect of shifting the burden of proof on the issue of purpose or knowledge. The jury found petitioner guilty, and the Montana Supreme Court affirmed, holding that although shifting the burden of proof to the defendant by means of a presumption is prohibited, allocation of *"some* burden of proof" to a defendant is permissible. Finding that under the instruction in question petitioner's sole burden was to produce *"some"* evidence that he did not intend the ordinary consequences of his voluntary acts, and not to disprove that he acted "purposely or knowingly," the Montana court held that the instruction did not violate due process standards.

Held: Because the jury may have interpreted the challenged presumption as conclusive, like the presumptions in *Morissette* v. *United States*, 342 U. S. 246, and *United States* v. *United States Gypsum Co.*, 438 U. S. 422, or as shifting the burden of persuasion, like that in *Mullaney* v. *Wilbur*, 421 U. S. 684, and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction is unconstitutional. Pp. 514–527.

(a) The effect of a presumption in a jury instruction is determined by the way in which a reasonable juror could have interpreted it, not by a state court's interpretation of its legal import. Pp. 514, 517.

(b) Conclusive presumptions "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," *Morissette, supra,* at 275, and they "invad[e the] factfinding function," *United States Gypsum Co., supra,* at 446, which in a criminal case the law assigns to the jury. The presumption announced to petitioner's jury may well have had exactly

these consequences, since upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and "ordinary consequences" of petitioner's action), the jury could have reasonably concluded that it was directed to find against petitioner on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," *In re Winship*, 397 U. S. 358, 364, and petitioner was deprived of his constitutional rights. Pp. 521–523.

(c) A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to petitioner, would have suffered from similar infirmities. If the jury interpreted the presumption in this manner, it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was then shifted to petitioner to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in *Mullaney, supra*. P. 524.

(d) Without merit is the State's argument that since the jury could have interpreted the word "intends" in the instruction as referring only to petitioner's "purpose," and could have convicted petitioner solely for his "knowledge" without considering "purpose," it might not have relied upon the tainted presumption at all. First, it is not clear that a jury would have so interpreted "intends." More significantly, even if a jury *could* have ignored the presumption, it cannot be certain that this is what it *did* do, as its verdict was a general one. Pp. 525–526.

(e) Since whether the jury's reliance upon the instruction constituted, or could have ever constituted, harmless error are issues that were not considered by the Montana Supreme Court, this Court will not reach them as an initial matter. Pp. 526–527.

176 Mont. 492, 580 P. 2d 106, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 527.

Byron W. Boggs, by appointment of the Court, 439 U. S. 1126, argued the cause and filed a brief for petitioner.

Michael T. Greely, Attorney General of Montana, argued the cause for respondent. With him on the brief were *Mike McCarter* and *Denny Moreen*, Assistant Attorneys General, and *John Radonich*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether, in a case in which intent is an element of the crime charged, the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

I

On November 22, 1976, 18-year-old David Sandstrom confessed to the slaying of Annie Jessen. Based upon the confession and corroborating evidence, petitioner was charged on December 2 with "deliberate homicide," Mont. Code Ann. § 45–5–102 (1978), in that he "purposely or knowingly caused the death of Annie Jessen." App. 3.[1] At trial, Sandstrom's attorney informed the jury that, although his client admitted killing Jessen, he did not do so "purposely or knowingly," and was therefore not guilty of "deliberate homicide" but of a lesser crime. *Id.*, at 6–8. The basic support for this contention was the testimony of two court-appointed mental health experts, each of whom described for the jury petitioner's mental state at the time of the incident. Sandstrom's attorney argued that this testimony demonstrated that petitioner, due to a personality disorder aggravated by alcohol consumption, did not kill Annie Jessen "purposely or knowingly." [2]

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[1] The statute provides:

"45–5–101. Criminal homicide. (1) A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being.

"(2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.

"45–5–102. Deliberate homicide. (1) Except as provided in 45–5–103 (1), criminal homicide constitutes deliberate homicide if:

"(a) it is committed purposely or knowingly . . . ."

[2] Petitioner initially filed a notice of intent to rely on "mental disease or defect excluding criminal responsibility" as a defense. That defense

The prosecution requested the trial judge to instruct the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." Petitioner's counsel objected, arguing that "the instruction has the effect of shifting the burden of proof on the issue of" purpose or knowledge to the defense, and that "that is impermissible under the Federal Constitution, due process of law." *Id.*, at 34. He offered to provide a number of federal decisions in support of the objection, including this Court's holding in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), but was told by the judge: "You can give those to the Supreme Court. The objection is overruled." App. 34. The instruction was delivered, the jury found petitioner guilty of deliberate homicide, *id.*, at 38, and petitioner was sentenced to 100 years in prison.

Sandstrom appealed to the Supreme Court of Montana, again contending that the instruction shifted to the defendant the burden of disproving an element of the crime charged, in violation of *Mullaney* v. *Wilbur*, *supra*, *In re Winship*, 397 U. S. 358 (1970), and *Patterson* v. *New York*, 432 U. S. 197 (1977). The Montana court conceded that these cases did prohibit shifting the burden of proof to the defendant by means of a presumption, but held that the cases "do not prohibit allocation of *some* burden of proof to a defendant under certain circumstances." 176 Mont. 492, 497, 580 P. 2d 106, 109 (1978). Since in the court's view, "[d]efendant's sole burden under instruction No. 5 was to produce *some* evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted 'purposely' or 'knowingly,' . . . the instruction does not violate due process

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required evidence that defendant was "unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Mont. Code Ann. § 46–14–101 (1978). The defense was withdrawn at trial, with the petitioner contending that, although he was not "unable" to form the requisite intent, he did not have it at the time of the killing.

standards as defined by the United States or Montana Constitution . . . ." *Ibid.* (emphasis added).

Both federal and state courts have held, under a variety of rationales, that the giving of an instruction similar to that challenged here is fatal to the validity of a criminal conviction.[3] We granted certiorari, 439 U. S. 1067 (1979), to decide the important question of the instruction's constitutionality. We reverse.

II

The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. See *Ulster County Court* v. *Allen*, *ante*, at 157–163. That determination requires careful attention to the words actually spoken to the jury, see *ante*, at 157–159, n. 16, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Respondent argues, first, that the instruction merely described a permissive inference—that is, it allowed but did not require the jury to draw conclusions about defendant's intent from his actions—and that such inferences are constitutional. Brief for Respondent 3, 15. These arguments need not detain us long, for even respondent admits that "it's possible" that

[3] See *Chappell* v. *United States*, 270 F. 2d 274 (CA9 1959); *Bloch* v. *United States*, 221 F. 2d 786 (CA9 1955); *Berkovitz* v. *United States*, 213 F. 2d 468 (CA5 1954); *Wardlaw* v. *United States*, 203 F. 2d 884 (CA5 1953); *State* v. *Warbritton*, 211 Kan. 506, 506 P. 2d 1152 (1973); *Hall* v. *State*, 49 Ala. App. 381, 385, 272 So. 2d 590, 593 (Crim. App. 1973). See also *United States* v. *Wharton*, 139 U. S. App. D. C. 293, 433 F. 2d 451 (1970). In addition, two United States Courts of Appeals have ordered their District Courts to delete the instruction in future cases. See *United States* v. *Garrett*, 574 F. 2d 778 (CA3 1978); *United States* v. *Chiantese*, 560 F. 2d 1244 (CA5 1977). The standard reference work for federal instructions, 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions 405 (3d ed. 1977), describes the instruction as "clearly erroneous," and as constituting "reversible error," *id.*, at 448.

the jury believed they were required to apply the presumption. Tr. of Oral Arg. 28. Sandstrom's jurors were told that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory. See generally *United States* v. *Wharton*, 139 U. S. App. D. C. 293, 298, 433 F. 2d 451, 456 (1970); *Green* v. *United States*, 132 U. S. App. D. C. 98, 99, 405 F. 2d 1368, 1369 (1968). See also Montana Rule of Evidence 301 (a).[4]

In the alternative, respondent urges that, even if viewed as a mandatory presumption rather than as a permissive inference, the presumption did not conclusively establish intent but rather could be rebutted. On this view, the instruction required the jury, if satisfied as to the facts which trigger the presumption, to find intent *unless* the defendant offered evidence to the contrary. Moreover, according to the State, all the defendant had to do to rebut the presumption was produce "some" contrary evidence; he did not have to "prove" that he lacked the required mental state. Thus, "[a]t most, it placed a *burden of production* on the petitioner," but "did not shift to petitioner the *burden of persuasion* with respect to any element of the offense . . . ." Brief for Respondent 3 (emphasis added). Again, respondent contends that presumptions with this limited effect pass constitutional muster.

We need not review respondent's constitutional argument on this point either, however, for we reject this characterization of the presumption as well. Respondent concedes there is a "risk" that the jury, once having found petitioner's act

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[4] "Rule 301. (a) Presumption defined. A presumption is an assumption of fact *that the law requires to be made* from another fact or group of facts found or otherwise established in the action or proceeding." (Emphasis added.)

voluntary, would interpret the instruction as automatically directing a finding of intent. Tr. of Oral Arg. 29. Moreover, the State also concedes that numerous courts "have differed as to the effect of the presumption when given as a jury instruction without further explanation as to its use by the jury," and that some have found it to shift more than the burden of production, and even to have conclusive effect. Brief for Respondent 17. Nonetheless, the State contends that the only authoritative reading of the effect of the presumption resides in the Supreme Court of Montana. And the State argues that by holding that "[d]efendant's sole burden under instruction No. 5 was to produce *some* evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted 'purposely' or 'knowingly,' " 176 Mont., at 497–498, 580 P. 2d, at 109 (emphasis added), the Montana Supreme Court decisively established that the presumption at most affected only the burden of going forward with evidence of intent—that is, the burden of production.[5]

The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law, but it is not the final authority on the interpre-

[5] For purposes of argument, we accept respondent's definition of the production burden when applied to a defendant in a criminal case. We note, however, that the burden is often described quite differently when it rests upon the prosecution. See *United States* v. *Vuitch*, 402 U. S. 62, 72 n. 7 (1971) ("evidence from which a jury could find a defendant guilty beyond a reasonable doubt"); C. McCormick, Evidence § 338, p. 790, and n. 33 (2d ed. 1972), p. 101, and n. 34.1 (Supp. 1978). We also note that the effect of a failure to meet the production burden is significantly different for the defendant and prosecution. When the prosecution fails to meet it, a directed verdict in favor of the defense results. Such a consequence is not possible upon a defendant's failure, however, as verdicts may not be directed against defendants in criminal cases. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977); *Carpenters* v. *United States*, 330 U. S. 395, 408 (1947); *Mims* v. *United States*, 375 F. 2d 135, 148 (CA5 1967).

tation which a jury could have given the instruction. If Montana intended its presumption to have only the effect described by its Supreme Court, then we are convinced that a reasonable juror could well have been misled by the instruction given, and could have believed that the presumption was not limited to requiring the defendant to satisfy only a burden of production. Petitioner's jury was told that "[*t*]*he law presumes* that a person intends the ordinary consequences of his voluntary acts." They were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of "some" evidence; nor even that it could be rebutted at all. Given the common definition of "presume" as "to suppose to be true without proof," Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.

First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence—thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. See generally *United States* v. *Wharton*, 139 U. S. App. D. C. 293, 433 F. 2d 451 (1970); *Berkovitz* v. *United States*, 213 F. 2d 468 (CA5 1954); *State* v. *Roberts*, 88 Wash. 2d 337, 341–342, 562 P. 2d 1259, 1261–1262 (1977) (en banc); *State* v. *War-*

britton, 211 Kan. 506, 509, 506 P. 2d 1152, 1155 (1973); *Hall* v. *State*, 49 Ala. App. 381, 385, 272 So. 2d 590, 593 (Crim. App. 1973). See also *United States* v. *Chiantese*, 560 F. 2d 1244, 1255 (CA5 1977). And although the Montana Supreme Court held to the contrary in this case, Montana's own Rules of Evidence expressly state that the presumption at issue here may be overcome only "by a preponderance of evidence contrary to the presumption." Montana Rule of Evidence 301 (b)(2).[6] Such a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of intent.[7]

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[6] Montana Code Ann. § 26–1–602 (1978) states:

" '[D]isputable presumptions' . . . may be controverted by other evidence. The following are of that kind:

. . . . . .

"3. that a person intends the ordinary consequence of his voluntary act."

Montana Rule of Evidence 301 provides:

"(b)(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. *A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.*" (Emphasis added.)

See also *Monaghan* v. *Standard Motor Co.*, 96 Mont. 165, 173–174, 29 P. 2d 378, 379–380 (1934). At oral argument, the Attorney General of Montana agreed that "admittedly Montana law . . . states that a presumption requires a person to overcome that presumption by a preponderance of evidence." Tr. of Oral Arg. 30.

We do not, of course, cite this Rule of Evidence to dispute the Montana Supreme Court's interpretation of its own law. It merely serves as evidence that a reasonable man—here, apparently, the drafter of Montana's own Rules of Evidence—could interpret the presumption at issue in this case as shifting to the defendant the burden of proving his innocence by a preponderance of the evidence.

[7] The potential for these interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased

We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.[8] *Ulster County Court* v. *Allen, ante,* at 159–160, n. 17, and at 175–176 (POWELL, J., dissenting); *Bachellar* v. *Maryland,* 397 U. S. 564, 570–571 (1970); *Leary* v. *United States,* 395 U. S. 6, 31–32 (1969); *Carpenters* v. *United States,* 330 U. S. 395, 408–409 (1947); *Bollenbach* v. *United States,* 326 U. S. 607, 611–614 (1946). It is the line of cases urged by petitioner, and exemplified by *In re Winship,* 397 U. S. 358 (1970), that provides the appropriate mode of constitutional analysis for these kinds of presumptions.[9]

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purposely or knowingly. App. 34–35; Brief for Respondent 21. But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that, although intent must be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt. Cf. *Mullaney* v. *Wilbur,* 421 U. S. 684, 703 n. 31 (1975) ("These procedural devices require (in the case of a presumption) . . . the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed . . . fact by having satisfactorily established other facts").

[8] Given our ultimate result in this case, we do not need to consider what kind of constitutional analysis would be appropriate for other kinds of presumptions.

[9] Another line of our cases also deals with the validity of certain kinds of presumptions. See *Ulster County Court* v. *Allen, ante,* p. 140; *Barnes* v. *United States,* 412 U. S. 837 (1973); *Turner* v. *United States,* 396

III

In *Winship*, this Court stated:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charged." *Id.*, at 364 (emphasis added).

Accord, *Patterson* v. *New York*, 432 U. S., at 210. The petitioner here was charged with and convicted of deliberate homicide, committed purposely or knowingly, under Mont. Code Ann. § 45–5–102 (a) (1978). See App. 3, 42. It is clear that under Montana law, whether the crime was committed purposely or knowingly is a fact necessary to constitute the crime of deliberate homicide.[10] Indeed, it was

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U. S. 398 (1970); *Leary* v. *United States*, 395 U. S. 6 (1969); *United States* v. *Romano*, 382 U. S. 136 (1965); *United States* v. *Gainey*, 380 U. S. 63 (1965); *Roviaro* v. *United States*, 353 U. S. 53 (1957); *Tot* v. *United States*, 319 U. S. 463 (1943). These cases did not, however, involve presumptions of the conclusive or persuasion-shifting variety. See *Ulster County Court* v. *Allen*, *ante*, at 157, and n. 16; and at 169 (POWELL, J., dissenting); *Mullaney* v. *Wilbur*, *supra*, at 703 n. 31; *Leary* v. *United States*, *supra*, at 35; *Roviaro* v. *United States*, *supra*, at 63; C. McCormick, Evidence 831 (2d ed. 1972).

A line of even older cases urged upon us by respondent is equally inapplicable. In *Agnew* v. *United States*, 165 U. S. 36, 50 (1897), the trial court's instruction expressly stated that the presumption was not conclusive, and this Court found that other problems with the instruction were cured by the charge considered as a whole. The other proffered cases simply involved general comments by the Court upon the validity of presuming intent from action. See *Radio Officers* v. *NLRB*, 347 U. S. 17, 45 (1954); *Cramer* v. *United States*, 325 U. S. 1, 31 (1945). See also *Reynolds* v. *United States*, 98 U. S. 145, 167 (1879) (religious objection to polygamy law not a defense).

[10] The statute is set out at n. 1, *supra*. In *State* v. *McKenzie*, 177 Mont. 280, 327–328, 581 P. 2d 1205, 1232 (1978), the Montana Supreme Court stated:

"In Montana, a person commits the offense of deliberate homicide if

the lone element of the offense at issue in Sandstrom's trial, as he confessed to causing the death of the victim, told the jury that knowledge and purpose were the only questions he was controverting, and introduced evidence solely on those points. App. 6–8. Moreover, it is conceded that proof of defendant's "intent" would be sufficient to establish this element.[11] Thus, the question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind. We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error.

We consider first the validity of a conclusive presumption. This Court has considered such a presumption on at least two prior occasions. In *Morissette* v. *United States*, 342 U. S. 246 (1952), the defendant was charged with willful and knowing theft of Government property. Although his attorney argued that for his client to be found guilty, "the taking must have been with felonious intent," the trial judge ruled that "[t]hat is presumed by his own act." *Id.*, at 249. After first concluding that intent was in fact an element of the crime charged, and after declaring that "[w]here intent of the ac-

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he purposely or knowingly causes the death of another human being. Sections 94–5–102 (1)(a), 94–5–101 (1), R. C. M. 1947. *The statutorily defined elements of the offense*, each of which the State must prove beyond a reasonable doubt, *are therefore causing the death of another human being with the knowledge* that you are causing *or with the purpose* to cause the death of that human being." (Emphasis added.)

Accord, *State* v. *Collins*, 178 Mont. 36, 45, 582 P. 2d 1179, 1184 (1978) ("committing the homicide 'purposely or knowingly' is an element of deliberate homicide").

[11] Respondent agrees that "intent" and "purpose" are roughly synonymous, see also Webster's New Collegiate Dictionary 601 (1974), but contests the relevance of "intent" to "knowledge." See Tr. of Oral Arg. 18; Brief for Respondent 8–9. This problem is discussed in Part IV, *infra*.

cused is an ingredient of the crime charged, its existence is . . . a jury issue," *Morissette* held:

> "*It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.* It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . . [But] [w]e think presumptive intent has no place in this case. *A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.* A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, *this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*" *Id.*, at 274–275. (Emphasis added; footnote omitted.)

Just last Term, in *United States* v. *United States Gypsum Co.*, 438 U. S. 422 (1978), we reaffirmed the holding of *Morissette*. In that case defendants, who were charged with criminal violations of the Sherman Act, challenged the following jury instruction:

> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result." 438 U. S., at 430.

After again determining that the offense included the element of intent, we held:

> "[A] defendant's state of mind or *intent is an element of a criminal antitrust offense which . . . cannot be taken from the trier of fact through reliance on a legal presumption* of wrongful intent from proof of an effect on prices. Cf. *Morissette* v. *United States* . . . .
>
> . . . . .
>
> "Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference. . . . [U]ltimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this fact-finding function." *Id.*, at 435, 446 (emphasis added).

See also *Hickory* v. *United States*, 160 U. S. 408, 422 (1896).

As in *Morissette* and *United States Gypsum Co.*, a conclusive presumption in this case would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and would "invade [the] factfinding function" which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may well have had exactly these consequences. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," 397 U. S., at 364, and defendant was deprived of his constitutional rights as explicated in *Winship*.

A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant, would have suffered from similar infirmities. If Sandstrom's jury interpreted the presumption in that manner, it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). In *Mullaney*, the charge was murder, which under Maine law required proof not only of intent but of malice. The trial court charged the jury that "'malice aforethought is an essential and indispensable element of the crime of murder.'" *Id.*, at 686. However, it also instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. *Ibid.* As we recounted just two Terms ago in *Patterson* v. *New York*, "[t]his Court . . . unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation." 432 U. S., at 214. And *Patterson* reaffirmed that "a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant" by means of such a presumption. *Id.*, at 215.

Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in *Mullaney*, or a conclusive presumption like those in *Morissette* and *United States Gypsum Co.*, and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional.

IV

Respondent has proposed two alternative rationales for affirming petitioner's conviction, even if the presumption at issue in this case is unconstitutional. First, the State notes that the jury was instructed that deliberate homicide may be committed "purposely *or knowingly*."[12] App. 35 (emphasis added). Since the jury was also instructed that a person "intends" the ordinary consequences of his voluntary acts, but was not provided with a definition of "intends," respondent argues that jurors could have interpreted the word as referring only to the defendant's "purpose." Thus, a jury which convicted Sandstrom solely for his "knowledge," and which interpreted "intends" as relevant only to "purpose", would not have needed to rely upon the tainted presumption at all.

We cannot accept respondent's argument. As an initial matter, we are not at all certain that a jury would interpret the word "intends" as bearing solely upon purpose. As we said in *United States* v. *United States Gypsum Co.*, 438 U. S., at 445, "[t]he element of intent in the criminal law has tradi-

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[12] The jurors were instructed:

"INSTRUCTION NO. 7

" 'Knowingly' is defined as follows: A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as 'knowing' or 'with knowledge' have the same meaning.

"INSTRUCTION NO. 8

" 'Purposely' is defined as follows: A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result." App. 35–36.

tionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." See also W. LaFave & A. Scott, Criminal Law 196 (1972).

But, more significantly, even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do.[13] As the jury's verdict was a general one, App. 38, we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, *e. g., Stromberg* v. *California,* 283 U. S. 359 (1931)." *Leary* v. *United States,* 395 U. S., at 31–32. See *Ulster County Court* v. *Allen, ante,* at 159–160, n. 17, and at 175–176 (POWELL, J., dissenting); *Bachellar* v. *Maryland,* 397 U. S., at 570–571; *Carpenters* v. *United States,* 330 U. S., at 408–409; *Bollenbach* v. *United States,* 326 U. S., at 611–614.

Respondent's final argument is that even if the jury did rely upon the unconstitutional instruction, this constituted harmless error under *Chapman* v. *California,* 386 U. S. 18 (1967), because both defendant's confession and the psychiatrist's testimony demonstrated that Sandstrom possessed the requisite mental state. Brief for Respondent 4–13. In reply, it is said that petitioner confessed only to the slaying and not to his mental state, that the psychiatrist's testimony amply supported his defense, Brief for Petitioner 15–16, and that in any event an unconstitutional jury instruction on an element of the crime can never constitute harmless error, see generally

[13] Indeed, with respondent's interpretation of "intends" as going solely to "purpose," it would be surprising if the jury considered "knowledge" before it considered "purpose." With the assistance of the presumption, the latter would have been easier to find than the former, and there is no reason to believe the jury would have deliberately undertaken the more difficult task.

Carpenters v. *United States, supra,* at 408–409; *Bollenbach* v. *United States, supra,* at 614, 615. As none of these issues was considered by the Supreme Court of Montana, we decline to reach them as an initial matter here. See *Moore* v. *Illinois,* 434 U. S. 220, 232 (1977); *Coleman* v. *Alabama,* 399 U. S. 1, 11 (1970). The Montana court will, of course, be free to consider them on remand if it so desires. *Ibid.* Accordingly, the judgment of the Supreme Court of Montana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring.

The Fourteenth Amendment to the United States Constitution prohibits any State from depriving a person of liberty without due process of law, and in *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975), this Court held that the Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant the burden of disproving an element of the crime charged. I am loath to see this Court go into the business of parsing jury instructions given by state trial courts, for as we have consistently recognized, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414 U. S. 141, 146–147 (1973). And surely if this charge had, in the words of the Court, "merely described a permissive inference," *ante,* at 514, it could not conceivably have run afoul of the constitutional decisions cited by the Court in its opinion. But a majority of my Brethren conclude that "it is clear that a reasonable juror could easily have viewed such an instruction as mandatory," *ante,* at 515, and counsel for the State admitted in oral argument "that 'it's possible' that the jury believed they were required to apply the presumption." *Ante,* at 514–515.

While I continue to have doubts as to whether this particular jury was so attentively attuned to the instructions of the trial court that it divined the difference recognized by lawyers between "infer" and "presume," I defer to the judgment of the majority of the Court that this difference in meaning may have been critical in its effect on the jury. I therefore concur in the Court's opinion and judgment.

UNITED GAS PIPE LINE CO. *v.* McCOMBS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78–17. Argued February 22, 1979—Decided June 18, 1979*

In 1954, the Federal Power Commission, now the Federal Energy Regulatory Commission, issued a certificate of public convenience and necessity authorizing the sale to petitioner United Gas Pipe Line Co. (United) of natural gas produced from a leased tract of land. After the lease had been assigned several times and a replacement certificate issued, the lessee-producer notified United in 1966 that the existing wells were depleted and that no other gas was available at that time. Despite a warning from the Commission, the lessee never sought the Commission's authorization, pursuant to § 7 (b) of the Natural Gas Act (Act), for abandoning the service in interstate commerce. The lease was subsequently assigned to a group headed by respondent McCombs, which group discovered new gas reserves underlying the tract and contracted to sell the gas to respondent E. I. du Pont de Nemours & Co. for uses in intrastate commerce. Upon learning of the renewed production, United asserted its contractual right to purchase the newly discovered gas and filed a complaint with the Commission. The Commission upheld the Administrative Law Judge's determination that the McCombs group could not divert the gas from the interstate market, because the gas had been dedicated to interstate commerce and the agency had never authorized an abandonment of service. In addition, the Commission refused to grant its approval retroactively since the supply of gas was not in fact depleted. Accordingly, the Commission ordered delivery to United of all gas derived from the tract. The Court of Appeals set aside the Commission's order, holding that "strict compliance" with § 7 (b)'s approval requirement was unnecessary in this case, the abandonment having been accomplished "as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service . . . for a period of five years."

Held:

1. Section 7 (b) requires producers to continue supplying in interstate

*Together with No. 78–249, *Federal Energy Regulatory Commission* v. *McCombs et al.*, also on certiorari to the same court.

commerce all gas produced from a dedicated leasehold until they obtain permission for abandonment from the Commission. Pp. 535–539.

(a) Congress could not have been more explicit in establishing Commission approval as a prerequisite for lawful abandonment of service within its jurisdiction. The statutory language simply does not admit of any exception to the procedure set forth in § 7 (b), as this Court's previous decisions have recognized. Pp. 535–538.

(b) The Commission's control over the continuation of service is a fundamental component of the regulatory scheme, and to deprive the Commission of this authority, even in limited circumstances, would conflict with basic policies underlying the Act. Requiring Commission approval of abandonment, "after due hearing," permits all interested parties to be heard and therefore facilitates full presentation of the facts necessary to determine whether § 7 (b)'s criteria have been met. Moreover, the obligation to obtain Commission approval promotes certainty and reliability in the regulatory scheme. Pp. 538–539.

2. It need not be determined whether § 7 (b) allows the Commission to approve an abandonment retroactively and disregard evidence of subsequent production, since the Commission did not abuse its discretion in declining to do so here. Given the potential for retroactive approvals to disrupt the regulatory scheme, it was within the Commission's discretion to reject allegations of good faith in failing to seek Commission approval as a sufficient justification, by itself, for determining whether the evidence available in 1966 warranted granting an abandonment. Pp. 539–541.

3. Respondents' contention that the current production of gas is not subject to § 7 (b)'s requirements is without merit. The Commission properly found that the certificates of public convenience and necessity cover all reservoirs located on the tract. And initiation of interstate service pursuant to the certificates dedicated *all* fields subject to the certificates. *California* v. *Southland Royalty Co.*, 436 U. S. 519, 525. Once so dedicated, there can be no withdrawal of that supply from the interstate market absent Commission approval. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 156. Pp. 541–543.

570 F. 2d 1376, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except STEWART, J., who took no part in the consideration or decision of the cases.

Knox Bemis argued the cause for petitioner in No. 78–17. With him on the briefs were *W. DeVier Pierson* and *James M.*

Costan. Richard A. Allen argued the cause for petitioner in No. 78–249. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Barnett,* and *Howard E. Shapiro.*

Stanley L. Cunningham argued the cause for respondents in both cases. With him on the brief were *Philip D. Hart* and *Terry R. Barrett.*†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under § 7 (c) of the Natural Gas Act, producers who sell natural gas to pipelines for resale in interstate commerce must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission.[1] Section 7 (b) of the Act obligates these producers to continue supplying gas in the interstate market until the Commission authorizes an "abandonment."[2] The principal issue presented by this case is whether a producer may, consistent with § 7 (b), ever terminate this service obligation without obtaining the agency's express approval.

I

The natural gas involved in this case is produced from a 163-acre tract of land located in Karnes County, Tex., and

†*Frederick Moring* filed a brief for the Associated Gas Distributors as *amicus curiae* urging reversal.

[1] 52 Stat. 825, as amended, 15 U. S. C. § 717f (c). See *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954). Pursuant to the Department of Energy Organization Act, 91 Stat. 565, the regulatory functions at issue here were transferred from the Federal Power Commission to the Federal Energy Regulatory Commission, effective October 1, 1977.

[2] Section 7 (b), 52 Stat. 824, 15 U. S. C. § 717f (b), provides:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

known as the Butler B tract. In 1948, the owner of this land, B. C. Butler, Sr., executed an oil and gas lease with W. R. Quin as the lessee. Quin's widow contracted in 1953 to sell petitioner United Gas Pipe Line Co. (United), for a 10-year period, all "merchantable natural gas . . . now or hereafter" produced from the Butler B tract. App. 7A. Because United was an interstate pipeline company, Ms. Quin applied to the Commission for a certificate of public convenience and necessity authorizing this sale. The certificate issued by the Commission contained neither a time limitation nor any designation of the depths from which the gas would be produced.

After United installed gathering facilities on the property and began receiving gas from a well 2,960 feet deep, the Butler B lease was assigned several times. H. A. Pagenkopf eventually obtained the leasehold, and in 1961, he agreed to extend the term of United's gas purchase contract through February 7, 1981. Upon Pagenkopf's application, the Commission issued a new certificate in 1963, authorizing continued service to United under the same terms as the earlier certificate. In March 1966, Pagenkopf assigned the Butler B lease to a group headed by L. H. Haring,[3] and shortly thereafter, the only successful well on the property stopped producing. Haring's operator, Bay Rock Corp., notified United some months later that the existing wells were depleted and no other gas would be available at that time. United replied that it would remove its metering equipment for use elsewhere, but would reinstall the equipment "if, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the above-captioned contract." App. 8A–9A. Despite the Commission's subsequent warning that § 7 (b) required the filing

[3] Although Haring advised United that he would apply to the Commission for a successor producer certificate, no application was ever filed. App. to Pet. for Cert. in No. 78–17, pp. A–6 to A–7.

of an abandonment application if no further sales were contemplated, Haring never sought the Commission's authorization for abandoning service to United.[4]

During 1971 and 1972, Haring divided the Butler B leasehold horizontally and vertically, and he assigned to a group headed by respondent McCombs a working interest in the eastern 113 acres of the tract between the depths of 6,500 and 8,653 feet. A few months later, the group acquired a similar interest in the entire Butler B tract from depths of 8,700 to 9,700 feet. Drilling to these deeper horizons, the McCombs group discovered new gas reserves.[5] In 1972, they contracted to sell this gas to respondent E. I. du Pont de Nemours & Co. for industrial uses in intrastate commerce. Upon learning of the renewed production, however, United asserted its rights under the 1953 contract, as extended in 1961, to purchase all gas produced from the property. When the McCombs group rejected this claim, United filed a complaint with the Commission.

The Commission upheld the Administrative Law Judge's determination that the McCombs group could not sell the

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[4] The Secretary of the Commission wrote Bay Rock in January 1971 that it would be necessary to file an application for permission to abandon service and a notice of cancellation of rate schedule. *Id.*, at A–100 to A–101. This letter also directed the lessee to submit either a copy of any agreement with United canceling the gas purchase contract or a statement from United "indicating its position with respect to the proposed abandonment." *Ibid.* The Secretary had written a similar letter to Pagenkopf in August 1968, but he, too, failed to respond. *Id.*, at A–97 to A–98.

[5] In addition to the Butler B interests, the McCombs group also owned an interest in an adjoining tract of land. In order to operate both tracts as a single entity, the group "unitized," or combined, their interests in Butler B with those in the corresponding depths of the adjacent tract. As a result, a fraction of the production from each of four successful wells located on the total unitized acreage is attributable to the Butler B leasehold for purposes of the gas purchase contract and the Commission's certificates. *Id.*, at A–8 to A–10. See generally 6 H. Williams & C. Meyers, Oil & Gas Law 2–3 (1977 ed.).

Butler B gas in intrastate commerce, at least through February 7, 1981. Opinion No. 740, App. to Pet. for Cert. in No. 78–17, pp. A–32 to A–33. In particular, the Commission found that the certificates issued to the group's predecessors covered all gas produced from the property, including the reserves discovered in 1971 and 1972.[6] Because these predecessors had commenced deliveries pursuant to the certificates, the Commission ruled that all reserves embraced by the certificates were "dedicated" to interstate commerce and could not be diverted from that market without obtaining the agency's approval under § 7 (b). Noting that it had not authorized abandonment during the 5-year interruption in service, the Commission refused to grant its approval retroactively where, as here, the supply of natural gas was not in fact depleted. Accordingly, the Commission declared the sales in intrastate commerce violative of the Act, and ordered delivery to United of all gas derived from the Butler B leasehold.[7]

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[6] In determining the scope of Pagenkopf's certificate, the Commission analyzed separately the depths covered and the duration of the obligation to sell gas in interstate commerce. The Commission based its conclusion that the certificates encompassed all reservoirs on the absence of any reference to particular depths in either the applications for certification, which incorporated the contract with United, or in the certificates issued Pagenkopf and Ms. Quin. App. to Pet. for Cert. in No. 78–17, pp. A–29 to A–35. Referring to the same documents, the Commission interpreted Pagenkopf's certificate to encompass all gas produced from wells drilled before the contract's expiration date, even if the gas is extracted after February 7, 1981. *Ibid.* However, the Commission refused to consider whether the certificate also covered gas produced from wells drilled after the contract's expiration date. *Id.*, at A–33, and n. 28; see *Sun Oil Co.* v. *FPC*, 364 U. S. 170 (1960). Since the parties have not challenged here these findings on duration, we express no view on the Commission's ruling concerning production beyond 1981.

[7] The Commission did not address the validity of United's gas purchase contract. McCombs has raised that issue in a separate suit, which is being held in abeyance pending completion of this litigation. *McCombs* v. *United Gas Pipe Line Co.*, No. SA–73–CA–210 (WD Tex., filed Aug. 2, 1973).

A divided panel of the Court of Appeals for the Tenth Circuit set aside the Commission's order. 570 F. 2d 1376 (1978).[8] The court did not dispute the Commission's determination that all gas underlying the Butler B tract had been dedicated to interstate commerce. However, while acknowledging that § 7 (b) expressly requires Commission approval before a producer may withdraw dedicated natural gas from the interstate market, the majority held that "strict compliance" with this requirement was unnecessary here. 570 F. 2d, at 1381. In the court's view, "there was no need for the formality of a Section 7 (b) hearing," *ibid.*, because

> "the abandonment of the service in the instant case was accomplished, as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds." *Id.*, at 1382.

In sum, the Court of Appeals considered the facts so clear that the abandonment issue was no longer "within the expertise of the Commission." *Id.*, at 1381. The dissenting judge found this conclusion "directly contrary to the plain terms of § 7 (b)," which mandate approval by the Commission as the sole means of effectuating a valid abandonment. *Id.*, at 1382.

We granted certiorari, 439 U. S. 892 (1978), and now reverse.

II

Congress could not have been more explicit in establishing Commission approval as a prerequisite for lawful abandon-

[8] The Court of Appeals rendered this decision on rehearing after withdrawing an earlier opinion by a different panel. See 542 F. 2d 1144 (1976).

ment of service within its jurisdiction. Section 7 (b) provides:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 52 Stat. 824, 15 U. S. C. § 717f (b).

Not only does the statute require companies to obtain the "approval of the Commission . . . after due hearing," but it also prohibits abandonment absent specific findings by the Commission. The language of § 7 (b) simply does not admit of any exception to the statutory procedure.[9]

This plain meaning has been acknowledged in several of our previous decisions. Emphasizing that the Natural Gas Act's fundamental purpose was to assure the public a reliable supply of gas at reasonable prices, the Court noted in *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U. S. 378 (1959), that once gas has been dedicated to interstate commerce, "there can be *no* withdrawal of that supply from continued interstate movement *without Commission approval.*" *Id.*, at 388, 389, 392 (emphasis added). The Court again addressed the neces-

[9] Although Congress has recently revised the federal scheme for regulating natural gas, see the Natural Gas Policy Act of 1978, 92 Stat. 3351, that legislation does not affect the outcome of this case. With certain exceptions not relevant here, gas reserves dedicated to interstate commerce before November 8, 1978, remain subject to § 7 (b) of the Natural Gas Act. See §§ 2 (18), 104, 106 (a), and 601 (a) of the Natural Gas Policy Act, 92 Stat. 3354, 3362, 3365, 3409, 15 U. S. C. §§ 3301 (18), 3314, 3316 (a), 3431 (a) (1976 ed., Supp. III); S. Conf. Rep. No. 95–1126, pp. 71–72, 82, 84–85, 123–124 (1978); H. R. Conf. Rep. No. 95–1752, pp. 71–72, 82, 84–85, 123–124 (1978).

sity of obtaining the agency's permission in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137 (1960). There, the Court upheld the Commission's authority to insist upon issuing permanent certificates of convenience and necessity, reasoning that this power was essential to prevent companies from circumventing the regulatory scheme. For if producers could demand certificates of limited duration, and thereby escape federal regulation when the certificates expire, the abandonment procedures of § 7 (b) would be rendered meaningless. 364 U. S., at 142–144, 148. Of particular importance here, the Court specifically considered the impact that depletion of gas supplies would have on a company's obligation to seek abandonment permission. Approving the Commission's practice of issuing certificates that extend beyond the expected life of a given reserve, the Court stressed:

> "[I]f the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7 (b). The Commission thus, even though there may be physical problems beyond its control, [keeps] legal control over the continuation of service by the applicants." *Id.*, at 158 n. 25.

In short, *Sunray* makes clear that producers must secure Commission approval to abandon service even when there is little or no doubt that gas supplies are exhausted.

This Court expressed a similar understanding of the abandonment provision in *United Gas Pipe Line Co.* v. *FPC*, 385 U. S. 83 (1966), which upheld the Commission's determination that a company had violated § 7 (b) of the Act by unilaterally abandoning jurisdictional facilities to avoid paying increased gas prices. In so holding, the Court reiterated that the "statutory necessity of *prior Commission approval*, with its underlying findings, *cannot be escaped*." 385 U. S., at 89 (emphasis added). We reaffirmed this interpretation of § 7 (b) just last Term in *California* v. *Southland Royalty*

Co., 436 U. S. 519 (1978). The lessees in *Southland* had dedicated to interstate commerce gas produced from a particular tract, but, when the lease expired, the lessors to whom the oil and gas rights had reverted arranged to sell the remaining gas in the intrastate market. This Court held that even expiration of the lease did not terminate the obligation to continue selling the gas in interstate commerce. To conclude otherwise, we reasoned, would enable private parties to circumvent the Commission's authority over abandonments. And evasion of federal jurisdiction by this means could not be reconciled with the principle that "[o]nce the gas commenced to flow into interstate commerce from the facilities used by the lessees, § 7 (b) require[s] that the *Commission's permission* be obtained prior to the discontinuance of 'any service rendered by means of such facilities.'" *Id.*, at 527 (emphasis added).

Thus, we have consistently recognized that the Commission's "legal control over the continuation of service," *Sunray, supra*, at 158 n. 25, is a fundamental component of the regulatory scheme. To deprive the Commission of this authority, even in limited circumstances, would conflict with basic policies underlying the Act.

Requiring Commission approval, "after due hearing," permits all interested parties to be heard and therefore facilitates full presentation of the facts necessary to determine whether § 7 (b)'s criteria have been met. Contrary to respondents' assumption, see Brief for Respondents 20–21, the Commission does not automatically approve abandonments whenever production has ceased. Indeed, the agency recently refused to grant an application where the producer had not adequately tested for new gas reserves.[10] Had the lessees in the instant case filed an application for abandonment between 1966 and 1971, United might well have demonstrated that exploration

[10] See *Texaco, Inc.*, FERC Docket Nos. G–8820 et al., Order Granting Petition for Reconsideration and Modifying Prior Order (Nov. 1, 1977).

of the leasehold had been insufficient to justify finding "the available supply of natural gas . . . depleted to the extent that the continuance of service [was] unwarranted." § 7 (b). And the Commission might have concluded that production from deeper reserves or other measures to restore service were feasible. Permitting natural gas companies to bypass abandonment proceedings simply because known reserves appear depleted would obviously foreclose these factual inquiries. Consequently, the abandonment determination would rest, as a practical matter, in the producer's control, a result clearly at odds with Congress' purpose to regulate the supply and price of natural gas. See *California* v. *Southland Royalty Co., supra,* at 526–527, 529–530; *Sunray Mid-Continent Oil Co.* v. *FPC, supra,* at 142–147.

Moreover, the obligation to obtain Commission approval promotes certainty and reliability in the regulatory scheme. Knowledge that termination of service is lawful only if authorized by the Commission enables producers, prospective assignees, and other interested parties to determine with assurance whether a particular tract remains dedicated to interstate commerce. In contrast, the Court of Appeals' test for *de facto* abandonment would invite speculation regarding the extent of the Commission's jurisdiction. The confusion that would inevitably result from the lack of clear standards as to when producers must seek Commission approval fortifies our conclusion that Congress intended agency supervision of all abandonments.

III

Respondents maintain that even if producers must always obtain Commission approval for abandonment, the decision below should nevertheless be affirmed. In their view, the Court of Appeals actually concluded that the Commission had erred as a matter of law by refusing to authorize an abandonment retroactively. Assuming this was the true purport of the decision below, we believe the Court of Appeals lacked

authority to set aside the Commission's order on this ground.

Although respondents urged the agency to authorize an abandonment of service from Butler B, the Administrative Law Judge and the Commission rejected this suggestion in light of the clear evidence that the leasehold was still capable of production. Respondents, however, contend that because Haring acted in good faith in failing to seek agency approval, the Commission was obligated to treat their answer to United's complaint as if it were an abandonment application filed in 1966. Thus, according to respondents, the Court of Appeals was entitled to conclude that the Commission should have ignored the evidence of subsequent production and authorized an abandonment based on the evidence available in 1966.

We need not determine whether § 7 (b) allows the Commission to approve an abandonment retroactively and disregard evidence of subsequent production.[11] For the agency certainly did not abuse its discretion in declining to do so here. Authorizing abandonments retroactively would often deprive interested parties of the opportunity to be heard at a meaningful time and to present evidence on the likelihood of renewing gas production in the future. Thus, the Commission would be required to determine on a hypothetical set of facts what action it would have taken had an application been timely filed. Additionally, the jurisdictional status of all dedicated acreage would become uncertain, since the property would be subject to retroactive Commission pronouncements in the indefinite future. Frequent retroactive action would

[11] Respondents contend that the Commission recently approved a retroactive § 7 (b) abandonment in *Arkansas Louisiana Gas Co.*, FPC Docket No. CP76-329 (Mar. 8, 1977). In that case, a certificated pipeline had agreed to sell excess gas, but its supply became depleted in 1971. Although the pipeline did not seek abandonment permission until 1977, the Commission approved the abandonment because the supply of excess gas was still depleted and there was no likelihood of obtaining additional gas. The agency's decision therefore had no retroactive impact.

also undermine the statutory scheme by creating an incentive for producers to delay seeking agency approval in the hope that they could later establish good faith. Given this potential for disruption of § 7 (b)'s approval procedure, we believe it is within the Commission's discretion to reject good faith alone as a sufficient justification for determining whether the evidence available in 1966 warranted granting an abandonment.[12]

IV

Finally, respondents defend the judgment below on the ground that only the depleted shallow reserves underlying Butler B, as opposed to the newly discovered gas, were subject

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[12] Relying on four lower court decisions that did not involve § 7 (b), respondents argue that the Commission was required to approve abandonment retroactively here. None of these cases, however, supports respondents' contention that the Commission abused its discretion in this suit. In *Ellwood City* v. *FERC*, 583 F. 2d 642 (CA3 1978), cert. denied, 440 U. S. 946 (1979), and *Niagara Mohawk Power Corp.* v. *FPC*, 126 U. S. App. D. C. 376, 379 F. 2d 153 (1967), the Courts of Appeals found no abuse of discretion in the Commission's decision to give retroactive effect to certain rate schedules and licensing orders. Accordingly, neither decision addresses whether the Commission was *required* to exercise its discretion in this manner. Moreover, retrospective action was taken in *Niagara Mohawk* to prevent the utility from benefiting by its failure to comply with the law, a consideration that militates against granting retroactive approval in the instant action.

Plaquemines Oil & Gas Co. v. *FPC*, 146 U. S. App. D. C. 287, 450 F. 2d 1334 (1971), merely held that once the Commission chooses "to regard as being done that which should have been done," *id.*, at 290, 450 F. 2d, at 1337, it must apply this principle consistently within the same case. Finally, *Highland Resources, Inc.* v. *FPC*, 537 F. 2d 1336 (CA5 1976), involved a producer that, relying on a published order of the Commission, failed to submit certain rate applications. After the agency changed its filing requirements, the producer promptly tendered the appropriate papers. The Commission nevertheless refused to give the application retroactive effect. The Court of Appeals set aside this aspect of the Commission's order, holding that a producer should not be penalized for its reliance on the agency's own pronouncements. There was no such reliance, however, in the present litigation. See n. 4, *supra*.

to the approval requirements of § 7 (b). In their view, the deliveries actually made in interstate commerce, rather than the certificates of public convenience and necessity, define the "service" that may not be abandoned without Commission approval. Although deliveries were once made from a reservoir approximately 2,900 feet deep, the "separate and distinct" gas from the deeper reservoirs was never delivered into interstate commerce. Thus, according to respondents, the current production is not subject to the requirements of § 7 (b), even though the certificates of public convenience and necessity cover all reservoirs located on Butler B.[13]

Our prior decisions compel rejection of this narrow statutory interpretation. In *California* v. *Southland Royalty Co.*, we expressly agreed with the Commission that the "initiation of interstate service pursuant to the certificate *dedicated all fields subject to that certificate.*" 436 U. S., at 525 (emphasis added). And as the Court emphasized in *Sunray Mid-Continent Oil Co.* v. *FPC*, " 'once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.' " 364 U. S., at 156, quoting *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U. S., at 389.[14]

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[13] Since the Commission and lower federal courts have held that § 7 (b) prohibits abandonment of service without agency approval even where the producer has not obtained a certificate, see, *e. g.*, *Cumberland Natural Gas Co.*, 34 F. P. C. 132 (1965); *Mesa Petroleum Co.* v. *FPC*, 441 F. 2d 182 (CA5 1971), respondents contend that § 7 (b)'s reference to "service rendered" can never be measured by the certificate of public convenience and necessity. See n. 2, *supra*. Respondents, however, misperceive the basis for these decisions. Because a company may not circumvent the regulatory scheme by failing to comply with the certification requirement, the Commission must, in such cases, rely on sources other than a certificate to ascertain the scope of a dedication in interstate commerce. These cases obviously do not preclude the agency from referring to certificates when they exist.

[14] The agency's decisions have reflected a similar understanding of § 7 (b). For example, in *Cumberland Natural Gas Co., supra*, where the

Applying these principles, the Commission determined that all reserves underlying Butler B were dedicated to interstate commerce pursuant to the certificates it had issued in 1954 and 1963, see *supra*, at 534, and n. 6, and therefore were subject to the requirements of § 7 (b). There being ample factual and legal justification for the Commission's conclusions, see *Sun Oil Co.* v. *FPC*, 364 U. S. 170 (1960), we hold that § 7 (b) requires respondents to continue supplying in interstate commerce all gas produced from the leasehold until they properly obtain permission for abandonment.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEWART took no part in the consideration or decision of these cases.

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producer had not yet obtained a certificate of convenience and necessity, the Commission held that "dedication of reserves for sale in interstate commerce occur[red] at least as soon as deliveries commenc[ed]" from any part of the 9,000-acre leasehold contractually committed to an interstate pipeline. 34 F. P. C., at 136. Accordingly, the agency required that all gas subsequently produced from the entire dedicated leasehold, even if discovered after the dedication, be sold in interstate commerce until the Commission approved an abandonment. *Id.*, at 136–137. See also *Pioneer Gathering System, Inc.*, 23 F. P. C. 260, 263 (1960); *Murphy Oil Corp.* v. *FERC*, 589 F. 2d 944 (CA8 1978); *Mitchell Energy Corp.* v. *FPC*, 533 F. 2d 258 (CA5 1976).

UNITED STATES ET AL. *v.* RUTHERFORD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-605. Argued April 25, 1979—Decided June 18, 1979

Terminally ill cancer patients and their spouses brought this action to enjoin the Government from interfering with the interstate shipment and sale of Laetrile, a drug not approved for distribution under the Federal Food, Drug, and Cosmetic Act (Act). Section 505 of the Act prohibits interstate distribution of any "new drug" unless the Secretary of Health, Education, and Welfare approves an application supported by substantial evidence of the drug's safety and effectiveness. Section 201 (p) (1) of the Act defines a "new drug" to include "any drug . . . not generally recognized . . . as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling." Finding that Laetrile, in proper dosages, was nontoxic and effective, the District Court ordered the Government to permit limited purchases of the drug by one of the named plaintiffs. While not disturbing the injunction, the Court of Appeals instructed the District Court to remand the case to the Food and Drug Administration (FDA) for determination whether Laetrile was a "new drug" under § 201 (p) (1), and, if so, whether it was exempt from premarketing approval under either of the Act's two grandfather clauses. After completion of administrative hearings, the Commissioner of the FDA found that Laetrile constituted a "new drug" as defined in § 201 (p) (1) and fell within neither grandfather provision. On review of the Commissioner's decision, the District Court concluded that Laetrile was entitled to an exemption from premarketing approval under the Act's 1962 grandfather clause and, alternatively, that the Commissioner had infringed constitutionally protected privacy interests by denying cancer patients access to Laetrile. The Court of Appeals, without addressing either the statutory or constitutional rulings of the District Court, held that the Act's "safety" and "effectiveness" standards have "no reasonable application" to terminally ill cancer patients and approved intravenous injections of Laetrile for such individuals.

Held: The Act makes no express exception for drugs used by the terminally ill and no implied exemption is necessary to attain congressional objectives or to avert an unreasonable reading of the terms "safe" and "effective" in § 201 (p) (1). Pp. 551-559.

(a) Nothing in the legislative history suggests that Congress intended protection only for persons suffering from curable diseases. Moreover, in implementing the statutory scheme, the FDA has never exempted drugs used by the terminally ill. The construction of a statute by those charged with its administration is entitled to substantial deference particularly where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives. Pp. 552–554.

(b) The Court of Appeals erred in concluding that the safety and effectiveness standards of § 201 (p) (1) could have "no reasonable application" to terminal patients. For purposes of § 201 (p) (1), the effectiveness of a drug does not necessarily denote capacity to cure; in the treatment of any illness, terminal or otherwise, a drug is effective if it fulfills, by objective indices, its sponsor's claims of prolonged life, improved physical condition, or reduced pain. Nor is the concept of safety under § 201 (p) (1) without meaning for terminal patients; a drug is unsafe for the terminally ill, as for anyone else, if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit. Finally, construing § 201 (p) (1) to encompass treatments for terminal diseases does not foreclose all resort to experimental cancer drugs by patients for whom conventional therapy is unavailing. That § 505 (i) of the Act makes explicit provision for carefully regulated use of certain drugs not yet demonstrated to be safe and effective reinforces the conclusion that no exception for terminal patients may be judicially implied. Pp. 554–559.

582 F. 2d 1234, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Solicitor General McCree argued the cause for the United States et al. With him on the briefs were *Assistant Attorney General Shenefield, Deputy Solicitor General Barnett, Elinor Hadley Stillman, Barry Grossman,* and *Richard M. Cooper.*

Kenneth Ray Coe argued the cause for respondents. With him on the brief were *Kirkpatrick W. Dilling* and *Dennis M. Gronek.**

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*Briefs of *amici curiae* urging reversal were filed by *Francis X. Bellotti,* Attorney General, and *Jonathan Brant,* Assistant Attorney General, for the

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether the Federal Food, Drug, and Cosmetic Act precludes terminally ill cancer patients from obtaining Laetrile, a drug not recognized as "safe and effective" within the meaning of § 201 (p)(1) of the Act, 52 Stat. 1041, as amended, 21 U. S. C. § 321 (p)(1).

I

Section 505 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1052, as amended, 21 U. S. C. § 355, prohibits interstate distribution of any "new drug" unless the Secretary of Health, Education, and Welfare approves an application supported by substantial evidence of the drug's safety and effectiveness.[1] As defined in § 201 (p)(1) of the Act, 21 U. S. C. § 321 (p)(1), the term "new drug" includes

"[a]ny drug . . . not generally recognized, among experts

Commonwealth of Massachusetts et al.; and by *Grace Powers Monaco* for the American Cancer Society, Inc.

Briefs of *amici curiae* urging affirmance were filed by *David H. Gill II* for the Committee for Freedom of Choice in Cancer Therapy; by *Stephen Tornay* for the McNaughton Foundation of California; by *Kirkpatrick W. Dilling* and *Dennis M. Gronek* for the National Health Federation; and by *Daniel H. Smith* for the Northwest Academy of Preventive Medicine.

Briefs of *amici curiae* were filed by *George Deukmejian*, Attorney General, *Robert Philibosian*, Chief Assistant Attorney General, *Daniel J. Kremer*, Assistant Attorney General, and *Harley D. Mayfield* and *Robert M. Foster*, Deputy Attorneys General, for the State of California; by *Dennis S. Avery* for the American Academy of Medical Preventics; by *David Laufer* for the Cancer Control Society; and by *David S. King* for the Save the United States Movement, Improving Public Health and Physical Fitness of the United States Citizens.

[1] Section 505, as set forth in 21 U. S. C. § 355, provides in part:

"(a) . . . No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) of this section is effective with respect to such drug.

"(b) . . . Any person may file with the Secretary an application with re-

> qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling . . . ."

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spect to any drug subject to the provisions of subsection (a) of this section. Such person shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use . . . .

. . . . .

"(d) . . . If the Secretary finds . . . that (1) the investigations . . . required to be submitted to the Secretary . . . do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; . . . (4) . . . he has insufficient information to determine whether such drug is safe for use under such conditions; or (5) . . . there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof; or (6) based on a fair evaluation of all material facts, such labeling is false or misleading in any particular; he shall issue an order refusing to approve the application. . . . As used in this subsection . . . , the term 'substantial evidence' means evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof.

. . . . .

"(i) . . . The Secretary shall promulgate regulations for exempting from the operation of the foregoing subsections of this section drugs intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs. . . ."

The Secretary has delegated his approval authority to the Commissioner of the Food and Drug Administration. See 21 CFR § 5.1 (a)(1) (1978).

Exemptions from premarketing approval procedures are available for drugs intended solely for investigative use [2] and drugs qualifying under either of the Act's two grandfather provisions.[3]

In 1975, terminally ill cancer patients and their spouses brought this action to enjoin the Government from interfering with the interstate shipment and sale of Laetrile, a drug not approved for distribution under the Act.[4] Finding that Laetrile, in proper dosages, was nontoxic and effective, the District Court ordered the Government to permit limited purchases of the drug by one of the named plaintiffs. 399 F.

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[2] The requirements for investigative use are set forth in § 505 (i) of the Act, 21 U. S. C. § 355 (i). See n. 1, *supra*.

[3] In the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1041, Congress exempted from the definition of "new drug" any drug that was subject to the Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, if its labeling retained the same representations concerning conditions of use made prior to 1938. This exemption is currently contained in § 201 (p) (1) of the Act, as codified in 21 U. S. C. § 321 (p) (1). The Drug Amendments of 1962 added a second grandfather clause, which provides:

"In the case of any drug which, on the day immediately preceding the enactment date [October 10, 1962], (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201 (p) of the basic Act as then in force, and (C) was not covered by an effective [new drug] application under section 505 of that Act, the amendments to section 201 (p) made by this Act shall not apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug on that day." § 107 (c) (4), 76 Stat. 789.

[4] The suit was originally instituted by a cancer patient, Juanita Stowe, and her husband, Jimmie Stowe. After Ms. Stowe's death, two other patients, Glen L. Rutherford and Phyllis S. Schneider, and Ms. Schneider's husband, filed an amended complaint on behalf of a class composed of all cancer patients and spouses responsible for the costs of treatment. By order entered April 8, 1977, the District Court certified a class consisting of terminally ill cancer patients. 429 F. Supp. 506 (WD Okla.). The Government did not seek review of that order.

Supp. 1208, 1215 (WD Okla. 1975).[5] On appeal by the Government, the Court of Appeals for the Tenth Circuit did not disturb the injunction. However, it instructed the District Court to remand the case to the Food and Drug Administration for determination whether Laetrile was a "new drug" under § 201 (p)(1), and, if so, whether it was exempt from premarketing approval under either of the Act's grandfather clauses. 542 F. 2d 1137 (1976).

After completion of administrative hearings,[6] the Commissioner issued his opinion on July 29, 1977. 42 Fed. Reg. 39768 (1977). He determined first that no uniform definition of Laetrile exists; rather, the term has been used generically for chemical compounds similar to, or consisting at least in part of, amygdalin, a glucoside present in the kernels or seeds of most fruits. *Id.*, at 39770–39772. The Commissioner further found that Laetrile in its various forms constituted a "new drug" as defined in § 201 (p)(1) of the Act because it was not generally recognized among experts as safe and effective for its prescribed use. See 42 Fed. Reg. 39775–39787 (1977). In so ruling, the Commissioner applied the statutory criteria delineated in *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 629–630 (1973), and concluded that there were no adequate well-controlled scientific studies of Laetrile's safety or effectiveness. 42 Fed. Reg. 39775–39787 (1977).[7]

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[5] The District Court subsequently entered similar orders for other individuals who submitted affidavits averring their membership in the certified class of terminally ill cancer patients. See App. 1–6.

[6] The Commissioner initiated proceedings with an announcement in the Federal Register seeking public comment. 42 Fed. Reg. 10066–10069 (1977). Notice was also afforded to certain known proponents of Laetrile. See *id.*, at 39785–39786.

[7] The Act does not define what constitutes general recognition of a drug's safety and effectiveness under § 201 (p)(1). However, based on the structure and purpose of the statutory scheme, this Court in *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S., at 629–634,

Having determined that Laetrile was a new drug, the Commissioner proceeded to consider whether it was exempt from premarketing approval under the 1938 or 1962 grandfather provisions. On the facts presented, the Commissioner found that Laetrile qualified under neither clause. See *id.*, at 39787–39795. First, there was no showing that the drug currently known as Laetrile was identical in composition or labeling to any drug distributed before 1938. See 21 U. S. C. § 321 (p)(1); n. 3, *supra*. Nor could the Commissioner conclude from the evidence submitted that, as of October 9, 1962, Laetrile in its present chemical composition was commercially used or sold in the United States, was generally recognized by experts as safe, and was labeled for the same recommended uses as the currently marketed drug. See § 107 (c)(4), 76 Stat. 789; n. 3, *supra*.

On review of the Commissioner's decision, the District Court sustained his determination that Laetrile, because not generally regarded as safe or effective, constituted a new drug under § 201 (p)(1). 438 F. Supp. 1287, 1293–1294 (WD Okla. 1977). The court also approved the Commissioner's denial of an exemption under the 1938 grandfather clause. However, concluding that the record did not support the Commissioner's findings as to the 1962 grandfather provision, the District Court ruled that Laetrile was entitled to an exemption from premarketing approval requirements. *Id.*, at 1294–1298. Alternatively, the court held that, by denying cancer patients the right to use a nontoxic substance in connection with their personal health, the Commissioner had infringed constitutionally protected privacy interests. *Id.*, at 1298–1300.

The Court of Appeals addressed neither the statutory nor the constitutional rulings of the District Court. Rather, the

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interpreted § 201 (p)(1) to require an "expert consensus" on safety and effectiveness founded upon "substantial evidence" as defined in § 505 (d) of the Act, 21 U. S. C. § 355 (d). See n. 1, *supra*.

Tenth Circuit held that "the 'safety' and 'effectiveness' terms used in the statute have no reasonable application to terminally ill cancer patients." 582 F. 2d 1234, 1236 (1978). Since those patients, by definition, would "die of cancer regardless of what may be done," the court concluded that there were no realistic standards against which to measure the safety and effectiveness of a drug for that class of individuals. *Id.*, at 1237. The Court of Appeals therefore approved the District Court's injunction permitting use of Laetrile by cancer patients certified as terminally ill. However, presumably because the Commissioner had found some evidence that Laetrile was toxic when orally administered, see 42 Fed. Reg. 39786–39787 (1977), the Court of Appeals limited relief to intravenous injections for patients under a doctor's supervision. 582 F. 2d, at 1237. In addition, the court directed the FDA to promulgate regulations "as if" the drug had been found " 'safe' and 'effective' " for terminally ill cancer patients. *Ibid.*

We granted certiorari, 439 U. S. 1127 (1979), and now reverse.

II

The Federal Food, Drug, and Cosmetic Act makes no special provision for drugs used to treat terminally ill patients. By its terms, § 505 of the Act requires premarketing approval for "any new drug" unless it is intended solely for investigative use or is exempt under one of the Act's grandfather provisions. See nn. 2, 3, *supra*. And § 201 (p)(1) defines "new drug" to encompass "[a]ny drug . . . not generally recognized . . . as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling." See *supra*, at 546–547.

When construing a statute so explicit in scope, a court must act within certain well-defined constraints. If a legislative purpose is expressed in "plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms." *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409 (1914). See *Andrus* v. *Sierra Club*, *ante*, p. 347.

Exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences obviously at variance with the policy of the enactment as a whole. *Helvering* v. *Hammell*, 311 U. S. 504, 510–511 (1941). See *TVA* v. *Hill*, 437 U. S. 153, 187–188 (1978); *United States* v. *Key*, 397 U. S. 322, 324–325 (1970); *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544 (1940). In the instant case, we are persuaded by the legislative history and consistent administrative interpretation of the Act that no implicit exemption for drugs used by the terminally ill is necessary to attain congressional objectives or to avert an unreasonable reading of the terms "safe" and "effective" in § 201 (p)(1).

A

Nothing in the history of the 1938 Food, Drug, and Cosmetic Act, which first established procedures for review of drug safety, or of the 1962 Amendments, which added the current safety and effectiveness standards in § 201 (p)(1),[8] suggests that Congress intended protection only for persons suffering from curable diseases. To the contrary, in deliberations preceding the 1938 Act, Congress expressed concern that individuals with fatal illnesses, such as cancer, should be shielded from fraudulent cures. See, *e. g.*, 79 Cong. Rec. 5023 (1935) (remarks of Sen. Copeland, sponsor of the Act); 83 Cong. Rec. 7786–7787, 7789 (1938) (remarks of Reps. Phillips and Lea). Similarly, proponents of the 1962 Amendments to the Act, including Senator Kefauver, one of the bill's sponsors,

[8] Under the 1938 Act, a "new drug" was one not generally recognized by qualified experts as safe for its recommended use. § 201 (p)(1), 52 Stat. 1041. The Drug Amendments of 1962, Pub. L. 87–781, 76 Stat. 789, redefined the term to include drugs not generally recognized as effective or safe for their intended use. § 201 (p)(1), 21 U. S. C. § 321 (p)(1). See *supra*, at 546–547, 551. In addition, the Amendments provided that no new drug application may be approved absent substantial evidence that the drug is effective as well as safe under prescribed conditions. § 505 (d), 21 U. S. C. § 355 (d). See n. 1, *supra*.

indicated an understanding that experimental drugs used to treat cancer "in its last stages" were within the ambit of the statute. See, *e. g.*, 108 Cong. Rec. 17399 (1962) (remarks of Sen. Kefauver); *id.*, at 17401 (comments of Sen. Eastland). That same understanding is reflected in the Committee Reports on the 1962 Amendments. Both Reports note with approval the FDA's policy of considering effectiveness when passing on the safety of drugs prescribed for "life-threatening disease." [9]

In implementing the statutory scheme, the FDA has never made exception for drugs used by the terminally ill. As this Court has often recognized, the construction of a statute by those charged with its administration is entitled to substantial deference. *Board of Governors of FRS* v. *First Lincoln-*

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[9] The Senate Report states:

"The Food and Drug Administration now requires, in determining whether a 'new drug' is safe, a showing as to the drug's effectiveness where the drug is offered for use in the treatment of a life-threatening disease, or where it appears that the 'new drug' will occasionally produce serious toxic or even lethal effects so that only its usefulness would justify the risks involved in its use. In such cases, the determination of safety is, in the light of the purposes of the new drug provisions, considered by the Food and Drug Administration to be inseparable from consideration of the drug's effectiveness. The provisions of the bill are in no way intended to affect any existing authority of the Department of Health, Education, and Welfare to consider and evaluate the effectiveness of a new drug in the context of passing upon its safety." S. Rep. No. 1744, 87th Cong., 2d Sess., pt. 1, p. 15 (1962).

See also H. R. Rep. No. 2464, 87th Cong., 2d Sess., 3 (1962).

The FDA's practice was further amplified by HEW Secretary Ribicoff in testimony on the bill that ultimately became the 1962 Amendments:

"If the drug is offered for treatment of progressive or life-threatening diseases, such as cancer, . . . we now consider its effectiveness. In such cases the determination of safety is, in the light of the purpose of the new drug provisions, inseparable from consideration of the drug's effectiveness." Hearings on S. 1552 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 2588 (1961).

wood Corp., 439 U. S. 234, 248 (1978); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U. S. 298, 304 (1977); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969); *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965).[10] Unless and until Congress does so, we are reluctant to disturb a long-standing administrative policy that comports with the plain language, history, and prophylactic purpose of the Act.

B

In the Court of Appeals' view, an implied exemption from the Act was justified because the safety and effectiveness

[10] To be sure, it may not always be realistic to infer approval of a judicial or administrative interpretation from congressional silence alone. See, *e. g.*, *Helvering* v. *Hallock*, 309 U. S. 106, 119–121 (1940); *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 140–141 (1941). But once an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 487–489 (1940). See *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956). See, *e. g.*, Pub. L. 94–295, 90 Stat. 575; Pub. L. 94–278, 90 Stat. 411; and Pub. L. 91–513, 84 Stat. 1281 (amending § 201 of the Act, 21 U. S. C. § 321).

The issue presented in this case plainly has not escaped public or legislative notice. Whether Laetrile should be freely accessible to cancer patients has been a frequent subject of political debate. Seventeen States have legalized the prescription and use of Laetrile for cancer treatment within their borders, and similar statutes have been defeated in 14 other States. See CCH F. D. Cosm. L. Rep. ¶ 42,292 (1978); Comment, Laetrile: Statutory and Constitutional Limitations on the Regulation of Ineffective Drugs, 127 U. Pa. L. Rev. 233, 234 n. 8 (1978). That Congress is aware of the FDA's policy concerning Laetrile is evident from Senate Subcommittee hearings on the Commissioner's 1977 ruling. See Hearing before the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources, 95th Cong., 1st Sess. (1977).

standards set forth in § 201 (p)(1) could have "no reasonable application" to terminally ill patients. 582 F. 2d, at 1236. We disagree. Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. See *Anderson* v. *Wilson*, 289 U. S. 20, 27 (1933). Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. See *TVA* v. *Hill*, 437 U. S., at 187–188. Here, however, we have no license to depart from the plain language of the Act, for Congress could reasonably have intended to shield terminal patients from ineffectual or unsafe drugs.

A drug is effective within the meaning of § 201 (p)(1) if there is general recognition among experts, founded on substantial evidence, that the drug in fact produces the results claimed for it under prescribed conditions. See *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S., at 629–634; n. 7, *supra*. Contrary to the Court of Appeals' apparent assumption, see 582 F. 2d, at 1236, effectiveness does not necessarily denote capacity to cure. In the treatment of any illness, terminal or otherwise, a drug is effective if it fulfills, by objective indices, its sponsor's claims of prolonged life, improved physical condition, or reduced pain. See 42 Fed. Reg. 39776–39786 (1977).

So too, the concept of safety under § 201 (p)(1) is not without meaning for terminal patients. Few if any drugs are completely safe in the sense that they may be taken by all persons in all circumstances without risk.[11] Thus, the Commissioner generally considers a drug safe when the expected therapeutic gain justifies the risk entailed by its use.[12] For

[11] See L. Goodman & A. Gilman, The Pharmacological Basis of Therapeutics 325–339 (5th ed. 1975).

[12] See statement of Dr. Theodore Klumpp, Chief, Drug Division, FDA, June 23, 1941, CCH F. D. Cosm. L. Rep. ¶ 71,053.59 (1977); n. 13, *infra*.

the terminally ill, as for anyone else, a drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit. Indeed, the Court of Appeals implicitly acknowledged that safety considerations have relevance for terminal cancer patients by restricting authorized use of Laetrile to intravenous injections for persons under a doctor's supervision. See 582 F. 2d, at 1237; *supra*, at 551.

Moreover, there is a special sense in which the relationship between drug effectiveness and safety has meaning in the context of incurable illnesses. An otherwise harmless drug can be dangerous to any patient if it does not produce its purported therapeutic effect. See 107 Cong. Rec. 5640 (1961) (comments of Sen. Kefauver). But if an individual suffering from a potentially fatal disease rejects conventional therapy in favor of a drug with no demonstrable curative properties, the consequences can be irreversible.[13] For this reason, even before the 1962 Amendments incorporated an efficacy standard into new drug application procedures, the FDA considered effectiveness when reviewing the safety of drugs used to treat terminal illness. See nn. 8, 9, *supra*. The FDA's practice also reflects the recognition, amply supported by expert medical testimony in this case, that with diseases such as cancer it is often impossible to identify a patient as terminally ill except in retrospect.[14] Cancers vary considerably in behavior

[13] See, *e. g.*, 42 Fed. Reg. 39768, 39787 (1977) (statement of Dr. Carl Leventhal, Deputy Director of the Bureau of Drugs, FDA, and Assistant Professor of Neurology and Pathology at Georgetown University) ("The safety of a drug for human use depends, in large measure, on the therapeutic effectiveness of the particular drug. . . . In the case of cancer, treatment with an ineffective drug will . . . inexorably lead to the patient's death"); *ibid.* (statement of Dr. George J. Hill II, Chairman of the Department of Surgery at Marshall University School of Medicine, W. Va.) (Ineffectual treatment can lead to delay in accepted modes of therapy and needless deaths; thus, "[i]n the absence of scientific evidence of effectiveness, no drug intended for use in treating cancer can be regarded as safe").

[14] See, *e. g.*, *id.*, at 39805 (statement of Dr. Peter Wiernik, Chief of the

and in responsiveness to different forms of therapy. See 42 Fed. Reg. 39777 (1977).[15] Even critically ill individuals may have unexpected remissions and may respond to conventional treatment. *Id.*, at 39777, 39805. Thus, as the Commissioner concluded, to exempt from the Act drugs with no proved effectiveness in the treatment of cancer "would lead to needless deaths and suffering among . . . patients characterized as 'terminal' who could actually be helped by legitimate therapy." *Id.*, at 39805.

It bears emphasis that although the Court of Appeals' ruling was limited to Laetrile, its reasoning cannot be so readily confined. To accept the proposition that the safety and efficacy standards of the Act have no relevance for terminal patients is to deny the Commissioner's authority over all drugs, how-

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Clinical Oncology Branch of the National Cancer Institute's Baltimore Research Center) ("[N]o one can prospectively define the term 'terminal' with any accuracy. A patient can be said to be terminal only after he dies. Many patients who are critically ill respond to modern day management of cancer"); *ibid.* (statement of Dr. Joseph Ross, Professor of Medicine, University of California School of Medicine at Los Angeles) ("[T]he distinction of 'terminal' patients from 'non-terminal' patients may not be reliably determined and an assumption that Laetrile may be given to ['terminal'] patients with impunity may deprive such patients of therapeutic measures which could help them").

[15] The Commissioner noted that these unexpected behavior patterns may account for anecdotal claims of Laetrile's effectiveness. Users of Laetrile who experience spontaneous remissions or delayed responses to conventional therapy after its abandonment may ascribe their improvement to Laetrile without any objective basis for that attribution. See, *e. g.*, *id.*, at 39777 (statement of Dr. Daniel S. Martin, researcher in cancer immunology and chemotherapy); *id.*, at 39800 (statement of Dr. Emil J. Freireich, Chief of the Division of Oncology at University of Texas Medical School at Houston); *ibid.* (statement of Dr. Melvin Krant, Director of Cancer Project at the University of Massachusetts Medical Center). Particularly since accepted cancer treatments such as chemotherapy and radiation often have painful side effects, the Commissioner concluded that patients who subjectively perceive improvement after substituting Laetrile for these modes of therapy may erroneously believe that their condition has been arrested or ameliorated. See *id.*, at 39777, 39799–39800.

ever toxic or ineffectual, for such individuals. If history is any guide, this new market would not be long overlooked. Since the turn of the century, resourceful entrepreneurs have advertised a wide variety of purportedly simple and painless cures for cancer, including liniments of turpentine, mustard, oil, eggs, and ammonia; peat moss; arrangements of colored floodlamps; pastes made from glycerin and limburger cheese; mineral tablets; and "Fountain of Youth" mixtures of spices, oil, and suet.[16] In citing these examples, we do not, of course, intend to deprecate the sincerity of Laetrile's current proponents, or to imply any opinion on whether that drug may ultimately prove safe and effective for cancer treatment. But this historical experience does suggest why Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise.

We note finally that construing § 201 (p)(1) to encompass treatments for terminal diseases does not foreclose all resort to experimental cancer drugs by patients for whom conventional therapy is unavailing. Section 505 (i) of the Act, 21 U. S. C. § 355 (i), exempts from premarketing approval drugs intended solely for investigative use if they satisfy certain preclinical testing and other criteria.[17] An application for clinical testing of Laetrile by the National Cancer Institute is now pending before the Commissioner. Brief for United States

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[16] CCH Fed. F. D. Cosm. L. Admin. Reps., 1907–1949, p. 745 (1951); *id.*, at 1408; *id.*, at 1170–1171, 1298–1299; *id.*, at 224; FDA Ann. Reps., 1950–1974, pp. 309, 464; *id.*, at 45; *id.*, at 412.

[17] See n. 1, *supra*. At present, some 300 experimental drugs are available to critically ill cancer patients at authorized institutions. See Brief for United States 34 n. 23; National Cancer Institute, Extramural Clinical Trial Programs of the Division of Cancer Treatment, General Overview and Scope of Contract-Supported Activities (1979). During 1977, over 90,000 cancer patients participated in investigative programs under the auspices of the National Cancer Institute or the Veterans' Administration. Brief for United States 35 n. 23.

35 n. 23. That the Act makes explicit provision for carefully regulated use of certain drugs not yet demonstrated safe and effective reinforces our conclusion that no exception for terminal patients may be judicially implied. Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[18]

So ordered.

[18] Respondents urge that we consider the District Court's rulings on the constitutional and grandfather clause questions as alternative bases for sustaining the judgment below. However, since the Court of Appeals addressed neither issue, we remand the case for further consideration of respondents' claims. See *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc.*, 435 U. S. 519, 549 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 271 (1977).

TOUCHE ROSS & CO. *v.* REDINGTON, TRUSTEE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-309. Argued March 26, 1979—Decided June 18, 1979

Petitioner accounting firm was retained by a securities brokerage firm (Weis) registered with the Securities and Exchange Commission (SEC) and a member of the New York Stock Exchange (Exchange), and in this capacity audited Weis' books and records and prepared for filing with the SEC the annual reports of financial condition required by § 17 (a) of the Securities Exchange Act of 1934 (1934 Act) and implementing regulations. Subsequently, because of Weis' precarious financial condition, respondent Redington was appointed as trustee in the liquidation of Weis' business pursuant to the Securities Investor Protection Act (SIPA). During the liquidation, Weis' cash and securities on hand, as well as a sum of money advanced by respondent Securities Investor Protection Corporation (SIPC) to the trustee under the SIPA, proved to be insufficient to make whole those customers who had left assets or deposits with Weis. The SIPC and the trustee then filed an action for damages against petitioner in District Court, seeking to impose liability upon petitioner by reason of its allegedly improper audit of Weis' financial statements and alleging that because of such improper conduct petitioner breached duties owed to the SIPC, the trustee, and others under the common law, § 17 (a), and the regulations, and that this misconduct prevented Weis' true financial condition from becoming known until it was too late to forestall liquidation or to lessen the adverse financial consequences to Weis' customers. The District Court dismissed the complaint, holding that no claim for relief was stated because no private cause of action could be implied from § 17 (a). The Court of Appeals reversed, holding that § 17 (a) imposes a duty on accountants, that a breach of this duty gives rise to an implied private right of action for damages in favor of a broker-dealer's customers, and that the SIPC and the trustee could assert this implied cause of action on behalf of Weis' customers.

Held: There is no implied private cause of action for damages under § 17 (a). Pp. 568-579.

(a) In terms, § 17 (a) simply requires broker-dealers to keep such records and file such reports as the SEC may prescribe, and does not purport to create a private cause of action in favor of anyone. The

section's intent, evident from its face, is to provide the SEC, the Exchange, and other authorities with a sufficiently early warning to enable them to take appropriate action to protect investors before a broker-dealer's financial collapse, and not by any stretch of its language does the section purport to confer private damages rights or any remedy in the event the regulatory authorities are unsuccessful in achieving their objectives and the broker-dealer becomes insolvent before corrective steps can be taken. Pp. 568–571.

(b) The conclusion that no private right of action is implicit in § 17 (a) is reinforced by the fact that the 1934 Act's legislative history is entirely silent on whether or not such a right of action should be available. This conclusion is also supported by the statutory scheme under which other sections of the Act explicitly grant private causes of action. More particularly, a cause of action in § 17 (a) should not be implied that is significantly broader than the one granted in § 18 (a), which provides the principal express civil remedy for misstatements in reports but limits it to purchasers and sellers of securities. Pp. 571–574.

(c) The inquiry in a case such as this ends when it is determined on the basis of the statutory language and the legislative history that Congress did not intend to create, either expressly or by implication, a private cause of action. Further inquiries as to the "necessity" of implying a private remedy and the proper forum for enforcement of the asserted rights have little relevance to the decision of the case. Pp. 575–576.

(d) Section 27 and the remedial purposes of the 1934 Act do not furnish a sufficient ground for holding that the federal courts should provide a damages remedy for petitioner's alleged breach of its duties under § 17 (a). Section 27 merely grants jurisdiction to federal district courts over violations of the Act and suits to enforce any liability or duty thereunder and provides for venue and service of process. It creates no cause of action of its own force and effect and imposes no liabilities. And generalized references to the "remedial purposes" of the Act do not justify reading a provision "more broadly than its language and the statutory scheme reasonably permit." *SEC* v. *Sloan*, 436 U. S. 103, 116. Pp. 576–578.

592 F. 2d 617, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 579. MARSHALL, J., filed a dissenting opinion, *post*, p. 580. POWELL, J., took no part in the consideration or decision of the case.

Arnold I. Roth argued the cause for petitioner. With him on the briefs were *Arthur S. Linker* and *Barry S. Berger.*

Philip R. Forlenza argued the cause for respondent Securities Investor Protection Corp. With him on the brief were *Wilfred R. Caron* and *Rafael Pastor. James B. Kobak, Jr.,* argued the cause for respondent Redington. With him on the brief was *John W. Schwartz.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no fewer than five times in cases in which we have granted certiorari.[1] Here we decide whether customers of securities brokerage firms that are required to file certain financial reports with regulatory authorities by § 17 (a) of the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 897, as amended, 15 U. S. C. § 78q (a), have an implied cause of action for damages under § 17 (a) against accountants who audit such reports, based on misstatements contained in the reports.[2]

**Kenneth J. Bialkin* and *Louis A. Craco* filed a brief for the American Institute of Certified Public Accountants as *amicus curiae* urging reversal.

[1] See, in addition to the instant case, *Chrysler Corp.* v. *Brown,* 441 U. S. 281 (1979); *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979); *Southeastern Community College* v. *Davis, ante,* p. 397; *Transamerica Mortgage Advisers, Inc.* v. *Lewis,* No. 77-1645, cert. granted, 439 U. S. 952 (1978).

[2] In 1972, the date relevant to the instant case, § 17 (a), as set forth in 15 U. S. C. § 78q (a) (1970 ed.), read as follows:

"(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such

I

Petitioner Touche Ross & Co. is a firm of certified public accountants. Weis Securities, Inc. (Weis), a securities brokerage firm registered as a broker-dealer with the Securities and Exchange Commission (Commission) and a member of the New York Stock Exchange (Exchange), retained Touche Ross to serve as Weis' independent certified public accountant from 1969 to 1973. In this capacity, Touche Ross conducted audits of Weis' books and records and prepared for filing with the Commission the annual reports of financial condition required by § 17 (a) of the 1934 Act, 15 U. S. C. § 78q (a), and the rules and regulations adopted thereunder. 17 CFR § 240.17a–5 (1972).[3] Touche Ross also prepared for Weis

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accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors."

Section 17 of the 1934 Act was substantially amended by the Securities Acts Amendments of 1975. § 14, 89 Stat. 137. The present § 17 (a)(1) contains essentially the same language as the first sentence of the 1972 version of § 17 (a). Compare 15 U. S. C. § 78q (a) (1970 ed.) with 15 U. S. C. § 78q (a)(1) (1976 ed.).

In *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194 n. 13 (1976), we reserved decision on the question whether the respondents in that case could assert a private cause of action against Ernst & Ernst under § 17 (a).

[3] At the time Touche Ross performed auditing services for Weis, Commission Rule 17a–5 required Weis to file an annual report of its financial condition, including a certificate by an independent public accountant stating "clearly the opinion of the accountant with respect to the financial statement covered by the certificate and the accounting principles and practices reflected therein." 17 CFR §§ 240.17a–5 (a), (h) (1972). See also SEC Release No. 3338 (Nov. 28, 1942), X–17A–5. The Rule also required the accountant's certificate to contain a "reasonably comprehensive statement as to the scope of the audit made, including a statement as to whether the accountant reviewed the procedures followed for safeguarding the securities of customers, . . . whether the audit was made in accordance with generally accepted auditing standards applicable in the circumstances; and . . . whether the audit made omitted any procedure

responses to financial questionnaires required by the Exchange of its member firms.

This case arises out of the insolvency and liquidation of Weis. In 1973, the Commission and the Exchange learned of Weis' precarious financial condition and of possible violations of the 1934 Act by Weis and its officers. In May 1973, the Commission sought and was granted an injunction barring Weis and five of its officers from conducting business in violation of the 1934 Act.[4] At the same time, the Securities Investor Protection Corporation (SIPC), pursuant to statutory authority, applied in the United States District Court for the Southern District of New York for a decree adjudging that Weis' customers were in need of the protection afforded by the Securities Investor Protection Act of 1970 (SIPA), 84 Stat. 1636, 15 U. S. C. § 78aaa *et seq.*[5] The District Court

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deemed necessary by the accountant under the circumstances of the particular case." 17 CFR § 240.17a–5 (g) (2) (1972). Nothing in the Rule was to be interpreted to imply authority to omit any procedure the accountant ordinarily would employ in the course of an audit made for the purpose of expressing the opinions required by the Rule. § 240.17a–5 (g) (3). Weis was required to attach an oath or affirmation to the report that the financial statements were true and correct. § 240.17a–5 (b) (2). The Commission has amended Rule 17a–5 since 1972. See 17 CFR § 240–17a–5 (1978).

[4] Some months later, several of Weis' officers were indicted, in part, for a conspiracy to violate and a number of substantive violations of the recordkeeping and reporting regulations adopted by the Commission under § 17 (a). *United States* v. *Levine*, 73 Crim. 693 (SDNY); see *United States* v. *Solomon*, 509 F. 2d 863, 865 (CA2 1975). Four of the defendants pleaded guilty to at least one substantive count; the other was found guilty of one substantive count. *Ibid.*

[5] SIPC is a nonprofit organization of securities dealers established by Congress in 1970 in the Securities Investor Protection Act. 15 U. S. C. § 78ccc. SIPC maintains a fund, supported by assessments of its members, which is used to compensate, up to specified limits, customers of brokerage firms who incur losses as a result of broker insolvencies. §§ 78ddd, 78fff (f). If SIPC determines that a member has failed or is in danger of failing to meet its obligations to customers and finds any

granted the requested decree and appointed respondent Redington (Trustee) to act as trustee in the liquidation of the Weis business under SIPA.

During the liquidation, Weis' cash and securities on hand appeared to be insufficient to make whole those customers who had left assets or deposits with Weis. Accordingly, pursuant to SIPA, SIPC advanced the Trustee $14 million to satisfy, up to specified statutory limits, the claims of the approximately 34,000 Weis customers and certain other creditors of Weis. Despite the advance of $14 million by SIPC, there apparently remain several million dollars of unsatisfied customer claims.[6]

In 1976, SIPC and the Trustee filed this action for damages against Touche Ross in the District Court for the Southern District of New York. The "common allegations" of the complaint, which at this stage of the case we must accept as true, aver that certain of Weis' officers conspired to conceal substantial operating losses during its 1972 fiscal year by falsifying financial reports required to be filed with regulatory authorities pursuant to § 17 (a) of the 1934 Act. App. 8. SIPC and the Trustee seek to impose liability upon Touche Ross by reason of its allegedly improper audit and certifica-

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one of five specified conditions indicating possible financial instability, it may apply to a court of competent jurisdiction for a decree adjudicating that the customers of such member are in need of the protection afforded by the Act. § 78eee (a)(2). SIPA also provides procedures for the liquidation of brokerage firms when required. § 78fff. See generally *Securities Investor Protection Corp.* v. *Barbour,* 421 U. S. 412, 415–418 (1975).

[6] At the time Weis was liquidated, property on hand permitted the Trustee to return to the Weis customers 67% of the property they should have received. 592 F. 2d 617, 620 n. 6 (CA2 1978). Subsequent marshaling of assets and recoveries in other litigation apparently have reduced the amount of the deficit in the fund of customer property. Brief for Respondent Redington 10 n. 5. The Weis customer accounts were protected by SIPA up to a maximum of $50,000 for each customer, except that cash claims were limited to $20,000. 15 U. S. C. § 78fff (f).

tion of the 1972 Weis financial statements and preparation of answers to the Exchange financial questionnaire. *Id.*, at 15–19. The complaint alleges that because of its improper conduct, Touche Ross breached duties that it owed SIPC, the Trustee, and others under the common law, § 17 (a) and the regulations thereunder, and that Touche Ross' alleged dereliction prevented Weis' true financial condition from becoming known until it was too late to take remedial action to forestall liquidation or to lessen the adverse financial consequences of such a liquidation to the Weis customers. App. 8–9. The Trustee seeks to recover $51 million on behalf of Weis in its own right and on behalf of the customers of Weis whose property the Trustee was unable to return. SIPC claims $14 million, either as subrogee of Weis' customers whose claims it has paid under SIPA or in its own right. The federal claims are based on § 17 (a) of the 1934 Act; the complaint also alleges several state common-law causes of action based on accountants' negligence, breach of contract, and breach of warranty.[7]

The District Court dismissed the complaint, holding that no claim for relief was stated because no private cause of action could be implied from § 17 (a). 428 F. Supp. 483 (SDNY 1977).[8] A divided panel of the Second Circuit reversed. 592

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[7] Approximately one year prior to institution of this action in federal court, SIPC and the Trustee commenced a nearly identical suit against Touche Ross in New York state court. *Redington* v. *Touche Ross & Co.*, Index No. 13996/76 (N. Y. S. Ct., N. Y. County). The parties, factual allegations, claims, and requests for damages are the same in the state-court action as they are in the federal suit, except that there is no claim in the state-court action under § 17 (a). Touche Ross has begun discovery in the state-court action, but otherwise it has remained virtually inactive since the filing of the complaint. 592 F. 2d, at 620 n. 7.

[8] In the District Court's view, § 17 (a) was essentially a bookkeeping provision. By its terms, it did not impose any duty on accountants and did not "create any rights in anybody." 428 F. Supp., at 489, 491. By contrast, the court noted that § 18 (a) of the 1934 Act, 15 U. S. C. § 78r (a), did create an express private right of action for damages arising

F. 2d 617 (1978). The court first found that § 17 (a) imposes a duty on accountants. 592 F. 2d, at 621. It next concluded, based on the factors set forth in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), that an accountant's breach of his § 17 (a) duty gives rise to an implied private right of action for damages in favor of a broker-dealer's customers, even though it acknowledged that the "legislative history of the section is mute on the issue." 592 F. 2d, at 622. The court held that SIPC and the Trustee could assert this implied cause of action on behalf of the Weis customers.[9] We granted certiorari, 439 U. S. 979 (1978), and we now reverse.

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from materially misleading statements in any report filed pursuant to the 1934 Act in favor of any person who, in reliance on the statements, purchased or sold a security whose price was affected by the statements. See n. 12, *infra*. SIPC and the Trustee could not sue under § 18 (a) because neither they nor Weis' customers had bought or sold stock in reliance on the reports Touche Ross had prepared and certified. In view of § 18 (a), the court declined to infer a private right of action under § 17 (a) broader than the express remedy Congress had created in the very next section of the Act. The court concluded that the subject matter, titles, and juxtaposition of the two sections "strongly suggest a legislative intent that the *only* private claim for a violation of Section 17 was the claim created in Section 18." 428 F. Supp., at 489.

The District Court also held that since the § 17 (a) claim should be dismissed, there was no basis for exercising pendent jurisdiction over the common-law claims, and that there was no other basis for exercising subject-matter jurisdiction over the common-law claims. 428 F. Supp., at 492–493. None of these latter rulings are before us.

[9] The court rejected the District Court's conclusion that § 18 (a) was intended to be the exclusive remedy for violation of § 17 (a). Because, in the court's view, it was plain that brokers' customers were the "favored wards" of § 17 (a), it could not agree that "Congress simultaneously sought to protect a class and deprived the class [by virtue of § 18's limiting language] of the means of protection." 592 F. 2d, at 623. The court held that the Trustee could assert the § 17 (a) action on behalf of the Weis customers as "bailee" of the customer property that he was unable to return, and that SIPC could sue on behalf of the customers as "subrogee" of the customers whose claims it had paid. 592 F. 2d, at 624–625. The court also held that the Trustee could not maintain the § 17 (a) action in its own right, and it

II

The question of the existence of a statutory cause of action is, of course, one of statutory construction. *Cannon* v. *University of Chicago*, 441 U. S. 677, 688 (1979); see *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453, 458 (1974) (hereinafter *Amtrak*). SIPC's argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced. Brief for Respondent SIPC 22–23. As we recently have emphasized, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago*, *supra*, at 688. Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted by SIPC and the Trustee. And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself. *Cannon* v. *University of Chicago*, *supra*, at 689; *Teamsters* v. *Daniel*, 439 U. S. 551, 558 (1979); *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 472 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 24 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197 (1976).

At the time pertinent to the case before us, § 17 (a) read, in relevant part, as follows:

> "Every national securities exchange, every member thereof, . . . and every broker or dealer registered pursuant

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reserved decision on whether "SIPC could ever have a claim for damages other than on behalf of a broker's customers." 592 F. 2d, at 624, and n. 13. The court remanded the case to the District Court for consideration of whether to exercise pendent jurisdiction over the state actions in light of the Court of Appeals' ruling on § 17 (a) and whether to stay the federal action pending determination of the state action. 592 F. 2d, at 619 n. 3, 625. Since we hold that the Court of Appeals wrongly implied a private federal claim under § 17 (a), it is unnecessary to reach these other rulings by the Court of Appeals.

> to . . . this title, shall make, keep, and preserve for such periods, such accounts, correspondence, . . . and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78q (a) (1970 ed.).

In terms, § 17 (a) simply requires broker-dealers and others to keep such records and file such reports as the Commission may prescribe. It does not, by its terms, purport to create a private cause of action in favor of anyone. It is true that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one. But in those cases finding such implied private remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private parties. *E. g., Cannon* v. *University of Chicago, supra* (20 U. S. C. § 1681); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975) (42 U. S. C. § 1981); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6 (1971) (15 U. S. C. § 78j (b)); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969) (42 U. S. C. § 1982); *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969) (42 U. S. C. § 1973c); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968) (42 U. S. C. § 1982); *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (15 U. S. C. § 78n (a)). By contrast, § 17 (a) neither confers rights on private parties nor proscribes any conduct as unlawful.

The intent of § 17 (a) is evident from its face. Section 17 (a) is like provisions in countless other statutes that simply require certain regulated businesses to keep records and file periodic reports to enable the relevant governmental authorities to perform their regulatory functions. The reports and records provide the regulatory authorities with the necessary information to oversee compliance with and enforce the various statutes and regulations with which they are concerned.

In this case, the § 17 (a) reports, along with inspections and other information, enable the Commission and the Exchange to ensure compliance with the "net capital rule," the principal regulatory tool by which the Commission and the Exchange monitor the financial health of brokerage firms and protect customers from the risks involved in leaving their cash and securities with broker-dealers.[10] The information contained in the § 17 (a) reports is intended to provide the Commission, the Exchange, and other authorities with a sufficiently early warning to enable them to take appropriate action to protect investors before the financial collapse of the particular broker-dealer involved. But § 17 (a) does not by any stretch of its language purport to confer private damages rights or, indeed, any remedy in the event the regulatory authorities are unsuccessful in achieving their objectives and the broker becomes insolvent before corrective steps can be taken. By its terms, § 17 (a) is forward-looking, not retrospective; it seeks to forestall insolvency, not to pro-

[10] See, *e. g.*, Study of Unsafe and Unsound Practices of Brokers and Dealers, Report and Recommendations of the Securities and Exchange Commission, H. R. Doc. No. 92–231, pp. 7–8, 15, 22, 24 (1971); Exchange Act Release No. 11497 (1975); *National Assn. of Securities Dealers, Inc.*, 12 S. E. C. 322, 329 n. 9 (1942). The net capital rule requires a broker to maintain a certain minimum ratio of net capital to aggregate indebtedness so that the broker's assets will always be sufficiently liquid to enable him to meet all of his current obligations. See 15 U. S. C. § 78*o* (c)(3); 17 CFR § 240.15c3–1 (1978).

A number of provisions of the 1934 Act provide the Commission with the authority needed to enforce the reporting requirements of § 17 (a) and the rules adopted thereunder. *E. g.*, § 15 (b)(4), 15 U. S. C. § 78*o* (b)(4) (authorizes institution of administrative proceedings and imposition of sanctions against brokers for, *inter alia*, materially misleading statements in reports or applications required to be filed with the Commission); § 21, 15 U. S. C. § 78u (allows Commission to investigate and enjoin violations and to refer violations to the Attorney General for possible prosecution); § 32, 15 U. S. C. § 78ff (authorizes criminal sanctions for violations of statute and rules and for materially misleading statements in reports or documents required to be filed by the statute or rules); see n. 4, *supra*.

vide recompense after it has occurred. In short, there is no basis in the language of § 17 (a) for inferring that a civil cause of action for damages lay in favor of anyone. *Cort* v. *Ash*, 422 U. S., at 79.

As the Court of Appeals recognized, the legislative history of the 1934 Act is entirely silent on the question whether a private right of action for damages should or should not be available under § 17 (a) in the circumstances of this case. 592 F. 2d, at 622. SIPC and the Trustee nevertheless argue that because Congress did not express an intent to deny a private cause of action under § 17 (a), this Court should infer one. But implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 64 (1978). And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17 (a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section. See *Cort* v. *Ash*, *supra*, at 82–84; cf. *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975); *Amtrak*, 414 U. S. 453 (1974); *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464 (1959).[11]

Further justification for our decision not to imply the private remedy that SIPC and the Trustee seek to establish may be found in the statutory scheme of which § 17 (a) is a part. First, § 17 (a) is flanked by provisions of the 1934

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[11] What legislative history there is of § 17 (a) simply confirms our belief that § 17 (a) was intended solely to be an integral part of a system of preventative reporting and monitoring, and not to provide remedies to customers for losses after liquidation. S. Rep. No. 792, 73d Cong., 2d Sess., 13, 21 (1934); H. R. Rep. No. 1383, 73d Cong., 2d Sess., 25 (1934); Hearing on H. R. 7852 et al. before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 22, 225–226 (1934). See also S. Rep. No. 94–75, p. 119 (1975) (legislative history of the 1975 amendments to § 17).

Act that explicitly grant private causes of action. § 16 (b), 15 U. S. C. § 78p (b); § 18 (a), 15 U. S. C. § 78r (a). Section 9 (e) of the 1934 Act also expressly provides a private right of action. 15 U. S. C. § 78i (e). See also § 20, 15 U. S. C. § 78t. Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 734 (1975); see *Amtrak*, *supra*, at 458; *T. I. M. E. Inc.* v. *United States*, *supra*, at 471.

Second, § 18 (a) creates a private cause of action against persons, such as accountants, who "make or cause to be made" materially misleading statements in any reports or other documents filed with the Commission, although the cause of action is limited to persons who, in reliance on the statements, purchased or sold a security whose price was affected by the statements.[12] 15 U. S. C. § 78r (a); see *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 211 n. 31; *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, at 736. Since SIPC and the Trustee do not allege that the Weis customers purchased

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[12] Section 18 (a), as set forth in 15 U. S. C. § 78r (a), provides:

"Liability for misleading statements

"(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant."

or sold securities in reliance on the § 17 (a) reports at issue, they cannot sue Touche Ross under § 18 (a).[13] Instead, their claim is that the Weis customers did not get the enforcement action they would have received if the § 17 (a) reports had been accurate.[14] SIPC and the Trustee argue that § 18 (a) cannot provide the exclusive remedy for misstatements made in § 17 (a) reports because the cause of action created by § 18 (a) is expressly limited to purchasers and sellers. They assert that Congress could not have intended in § 18 (a) to deprive customers, such as those whom they seek to represent, of a cause of action for misstatements contained in § 17 (a) reports.

There is evidence to support the view that § 18 (a) was intended to provide the exclusive remedy for misstatements contained in any reports filed with the Commission, including

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[13] In another action arising out of the Weis financial collapse, the District Court has sustained a § 18 (a) claim against Touche Ross by a bank that allegedly purchased securities of Weis in reliance upon the § 17 (a) reports involved in this case. *Exchange National Bank* v. *Touche Ross & Co.*, 75 Civ. 916 (SDNY); see 592 F. 2d, at 631 n. 5 (Mulligan, J., dissenting). And in a case related to the instant case, the customers of Weis brought a class action against Touche Ross under § 18 (a), claiming, *inter alia*, that Touche Ross violated Commission Rule 17a–5, 17 CFR § 240.17a–5 (1972). The District Court in that case dismissed the complaint on the ground that the plaintiffs did not meet the purchaser-seller requirement of § 18 (a) and thus could not maintain an action under that section. *Rich* v. *Touche Ross & Co.*, 415 F. Supp. 95, 102–104 (SDNY 1976). We express no view as to the correctness of either of these rulings.

[14] For example, the complaint alleges:

"Weis' 1973 forced liquidation under [SIPA] would not have become necessary, and most if not all of Weis' assets and its good will as a going concern could have been preserved by a number of means including [infusion of capital or merger with another firm] . . . . Moreover, if a liquidation of Weis had become necessary as the result of . . . truthful reporting, such liquidation could have occurred at the end of Weis' 1972 fiscal year, when its assets were greater and the aggregate of its liabilities was lower than a year later." App. 8–9.

those filed pursuant to § 17 (a).[15] Certainly, SIPC and the Trustee have pointed to no evidence of a legislative intent to except § 17 (a) reports from § 18 (a)'s purview. Cf. *Securities Investor Protection Corp.*, 421 U. S., at 419–420; *Amtrak*, 414 U. S., at 458. But we need not decide whether Congress expressly intended § 18 (a) to provide the exclusive remedy for misstatements contained in § 17 (a) reports. For where the principal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of § 17 (a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in § 17 (a) that is significantly broader than the remedy that Congress chose to provide. *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, at 735–736; see *Ernst & Ernst* v. *Hochfelder*, *supra*, at 210; *Securities Investor Protection Corp.* v. *Barbour*, *supra*, at 421–423; *Amtrak*, *supra*, at 458; cf. *T. I. M. E. Inc.* v. *United States*, 359 U. S., at 471.[16]

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[15] For example, Senator Fletcher in introducing the bill that formed the basis for the 1934 Act, stated that "Section [18] imposes civil liability for false or misleading statements *in any of the reports* or records required under this act." 78 Cong. Rec. 2271 (1934) (emphasis added). Richard Whitney, President of the New York Stock Exchange, testified at length regarding the 1934 Act proposals. In testimony before the Senate Committee on Banking and Currency, he indicated his understanding that § 18 (a) liability extended to "persons transacting business in securities." Hearings on S. Res. 84 et al. before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., pt. 15, p. 6638 (1934).

[16] Touche Ross insists that the existence of SIPA also is relevant to the question whether to imply a private right of action in § 17 (a). Congress specifically enacted SIPA in 1970 to afford customers of broker-dealers, such as Weis' customers, protection against losses they might incur as a result of the financial failure of their broker-dealer. SIPA established a comprehensive plan of insurance for customers of brokerage firms. See n. 5, *supra*. And recently, Congress has increased the amounts by which customer accounts are insured to $40,000 for cash claims and $100,000 for cash and securities claims. Securities Investor Protection Act Amendments of 1978, § 9, 92 Stat. 265, 15 U. S. C. § 78fff–3 (1976 ed., Supp. III). Touche Ross asserts that there is no indication in the legislative

SIPC and the Trustee urge, and the Court of Appeals agreed, that the analysis should not stop here. Relying on the factors set forth in *Cort* v. *Ash*, 422 U. S., at 78, they assert that we also must consider whether an implied private remedy is necessary to "effectuate the purpose of the section" and whether the cause of action is one traditionally relegated to state law. SIPC and the Trustee contend that implication of a private remedy is essential to the goals of § 17 (a) and that enforcement of § 17 (a) is properly a matter of federal, not state, concern. Brief for Respondent Redington 30–35; Brief for Respondent SIPC 42–52. We need not reach the merits of the arguments concerning the "necessity" of implying a private remedy and the proper forum for enforcement of the rights asserted by SIPC and the Trustee, for we believe such inquiries have little relevance to the decision of this case. It is true that in *Cort* v. *Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its

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history of SIPA or its amendments that Congress thought the 1934 Act contained a remedy for customers of insolvent brokerage firms. Brief for Petitioner 62 n. 37; Reply Brief for Petitioner 11–12. It claims that Congress believed it was "'filling a regulatory void'" when it passed SIPA. *Id.*, at 12; see S. Rep. No. 91–1218, p. 3 (1970). Given the fact that our task is to discern the intent of Congress when it enacted § 17 (a) in 1934, we doubt the relevance of SIPA to our inquiry. And even if the 91st Congress had believed that there was an implied right of action under § 17 (a), SIPA still would have been needed to protect customers in situations where there was no fraud or where the fraud was committed only by the broker, who, because of its insolvency, would probably be judgment proof. Accordingly, our decision not to infer a right of action in favor of brokerage customers from § 17 (a) is not influenced by the existence of SIPA.

legislative history, and its purpose, see 422 U. S., at 78—are ones traditionally relied upon in determining legislative intent. Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17 (a). At least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative.

Finally, SIPA and the Trustee argue that our decision in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), requires implication of a private cause of action under § 17 (a). In *Borak*, the Court found in § 14 (a) of the 1934 Act, 15 U. S. C. § 78n (a), an implied cause of action for damages in favor of shareholders for losses resulting from deceptive proxy solicitations in violation of § 14 (a). SIPC and the Trustee emphasize language in *Borak* that discusses the remedial purposes of the 1934 Act and § 27 of the Act, which, *inter alia*, grants to federal district courts the exclusive jurisdiction of violations of the Act and suits to enforce any liability or duty created by the Act or the rules and regulations thereunder.[17] They argue that

[17] Section 27, as set forth in 15 U. S. C. § 78aa, provides as follows:

"The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever

Touche Ross has breached its duties under § 17 (a) and the rules adopted thereunder and that in view of § 27 and of the remedial purposes of the 1934 Act, federal courts should provide a damages remedy for the breach.[18]

The reliance of SIPC and the Trustee on § 27 is misplaced. Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision. See *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S., at 424. The Court in *Borak* found a private cause of action implicit in § 14 (a). See *Cannon* v. *University of Chicago*, 441 U. S., at 690–693, n. 13; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. at 25; *Allen* v. *State Board of Elections*, 393 U. S., at 557. We do not now question the actual holding of that case, but we decline to read the opinion so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action. *E. g., Piper* v. *Chris-Craft Industries, Inc., supra.*[19]

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the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

[18] SIPC and the Trustee also appear to suggest that the rules adopted under § 17 (a) can themselves provide the source of an implied damages remedy even if § 17 (a) itself cannot. See Brief for Respondent SIPC 27–31; Brief for Respondent Redington 25–35; n. 3, *supra*. It suffices to say, however, that the language of the statute and not the rules must control. *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 214; *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 472 (1977).

[19] We also have found implicit within § 10 (b) of the 1934 Act a private cause of action for damages. See *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971). But we recently have stated that in *Superintendent* this Court simply explicitly acquiesced in the 25-

The invocation of the "remedial purposes" of the 1934 Act is similarly unavailing. Only last Term, we emphasized that generalized references to the "remedial purposes" of the 1934 Act will not justify reading a provision "more broadly than its language and the statutory scheme reasonably permit." *SEC* v. *Sloan*, 436 U. S. 103, 116 (1978); see *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 200. Certainly, the mere fact that § 17 (a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf. *Cannon* v. *University of Chicago*, *supra*, at 688, and n. 9; *Securities Investor Protection Corp.* v. *Barbour*, *supra*, at 421. To the extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today. *Cannon* v. *University of Chicago*, *supra*, at 688–709. The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.

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year-old acceptance by the lower federal courts of an implied action under § 10 (b). *Cannon* v. *University of Chicago*, 441 U. S., at 690–693, n. 13; see *Ernst & Ernst* v. *Hochfelder*, *supra*, at 196; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975). There is no similar history of longstanding lower-court interpretation in this case. Indeed, only one other court in the 45-year history of the 1934 Act has held that a private cause of action for damages is available under § 17 (a). *Hawkins* v. *Merrill, Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104, 124 (WD Ark. 1949). In *Hawkins*, a national brokerage firm was held liable for damages under § 17 (a) to a defalcating correspondent's customers for improperly advising the correspondent, who was found to be controlled by the national firm, to describe its business in such a way as to avoid filing certified financial statements with the Commission under § 17 (a). Citing *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946), the District Court simply stated that violation of any of the provisions of the 1934 Act would give rise to a civil suit for damages on the part of the one injured, and that the defendants did not contend to the contrary. 85 F. Supp., at 121.

III

SIPC and the Trustee contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. "[I]t is not for us to fill any *hiatus* Congress has left in this area." *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963). Obviously, nothing we have said prevents Congress from creating a private right of action on behalf of brokerage firm customers for losses arising from misstatements contained in § 17 (a) reports. But if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. The Court of Appeals implied a cause of action for damages under § 17 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78q (a), in favor of respondents, who purport to represent customers of a bankrupt brokerage firm, against petitioner accounting firm, which allegedly injured those customers by improperly preparing and certifying the reports on the brokerage firm required by § 17 (a) and the rules promulgated thereunder. Under the tests established in our prior cases, no cause of action should be implied for respondents under § 17 (a). Although analyses of the several factors outlined in *Cort* v. *Ash*, 422 U. S. 66 (1975), may often overlap, I agree that when, as here, a statute clearly

does not "create a federal right in favor of the plaintiff," *id.*, at 78, *i. e.*, when the plaintiff is not " 'one of the class for whose *especial* benefit the statute was enacted,' " *ibid.*, quoting *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916), and when there is also in the legislative history no "indication of legislative intent, explicit or implicit, . . . to create such a remedy," 422 U. S., at 78, the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action.

MR. JUSTICE MARSHALL, dissenting.

In determining whether to imply a private cause of action for damages under a statute that does not expressly authorize such a remedy, this Court has considered four factors:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash*, 422 U. S. 66, 78 (1975) (citations omitted).

Applying these factors, I believe respondents are entitled to bring an action against accountants who have allegedly breached duties imposed under § 17 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78q (a).

Since respondents seek relief on behalf of brokerage firm customers, the first inquiry is whether those customers are the intended beneficiaries of the regulatory scheme. Under § 17 (a), brokers must file such reports "as the [SEC], by rule, prescribes as necessary or appropriate . . . *for the protection of investors.*" 15 U. S. C. § 78q (a)(1) (emphasis added). Cf.

J. I. Case Co. v. *Borak*, 377 U. S. 426, 432 (1964). Pursuant to this authority, the SEC requires brokers to provide a battery of financial statements, and directs independent accountants to verify the brokers' reports. 17 CFR § 240.17a–5 (1978); see also *ante*, at 563–564, n. 3. The purpose of these requirements, as the Commission has consistently emphasized, is to enable regulators to "monitor the financial health of brokerage firms and protect customers from the risks involved in leaving their cash and securities with broker-dealers." *Ante*, at 570.[1] In addition, at the time of the events giving rise to this suit, the rules implementing § 17 mandated that brokers disclose to customers whether an accountant's audit had revealed any "material inadequacies" in financial procedures. 37 Fed. Reg. 14608 (1972). Thus, it is clear that brokerage firm customers are the "favored wards" of § 17, 592 F. 2d 617, 623 (CA2 1978), and that the initial test of *Cort* v. *Ash* is satisfied here.[2]

With respect to the second *Cort* factor, the legislative history does not explicitly address the availability of a damages remedy under § 17. The majority, however, discerns an intent to deny private remedies from two aspects of the statutory scheme. Because unrelated sections in the 1934 Act expressly grant private rights of action for violation of their terms, the Court suggests that Congress would have made such provision under § 17 had it wished to do so. But as we noted recently in *Cannon* v. *University of Chicago*, 441 U. S.

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[1] See SEC, Study of Unsafe and Unsound Practices of Brokers and Dealers, H. R. Doc. No. 92–231, p. 24 (1971); Exchange Act Release No. 8024 (1967); Exchange Act Release No. 11497 (1975); see also 592 F. 2d 617, 621–622 (CA2 1978).

[2] In the Court's view, it is inappropriate to imply a private remedy because § 17 (a) "neither confers rights on private parties nor proscribes any conduct as unlawful." *Ante*, at 569. But § 17 does impose duties for the benefit of private parties; in that sense, it both generates expectations, on which customers may appropriately rely, that those duties will be performed, and prohibits conduct inconsistent with the obligations created.

677, 711 (1979), "that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." The Court finds a further indication of congressional intent in the interaction between §§ 17 and 18 of the 1934 Act. Section 18 (a), 15 U. S. C. § 78r (a), affords an express remedy for misstatements in reports filed with the Commission, apparently including reports required by § 17, but limits relief to purchasers or sellers of securities whose price was affected by the misstatement. In light of this limitation, the majority reasons, we should not imply a remedy under § 17 which embraces a broader class of plaintiffs. However, § 18 pertains to investors who are injured in the course of securities transactions, while § 17 is concerned exclusively with brokerage firm customers who may be injured by a broker's insolvency. Given this divergence in focus, § 18 does not reflect an intent to restrict the remedies available under § 17. Indeed, since false reports regarding a broker's financial condition would not affect the price of securities held by the broker's customers, § 18 would provide these persons with no remedy at all. I am unwilling to assume that "Congress simultaneously sought to protect a class and deprived [it] of the means of protection." 592 F. 2d, at 623.

A cause of action for damages here is also consistent with the underlying purposes of the legislative scheme. Because the SEC lacks the resources to audit all the documents that brokers file, it must rely on certification by accountants. See *J. I. Case Co.* v. *Borak, supra,* at 432; *Allen* v. *State Board of Elections,* 393 U. S. 544, 556 (1969); see also 592 F. 2d, at 623 n. 12. Implying a private right of action would both facilitate the SEC's enforcement efforts and provide an incentive for accountants to perform their certification functions properly.

Finally, enforcement of the 1934 Act's reporting provisions is plainly not a matter of traditional state concern, but rather

relates solely to the effectiveness of federal statutory requirements. And, as the Court of Appeals held, since the problems caused by broker insolvencies are national in scope, so too must be the standards governing financial disclosure. *Id.*, at 623.

In sum, straightforward application of the four *Cort* factors compels affirmance of the judgment below. Because the Court misapplies this precedent and disregards the evident purpose of § 17, I respectfully dissent.

PARHAM, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF GEORGIA, ET AL. *v.* J. R. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 75–1690. Argued December 6, 1977—Reargued October 10, 1978—Decided June 20, 1979

Appellees, children being treated in a Georgia state mental hospital, instituted in Federal District Court a class action against Georgia mental health officials. Appellees sought a declaratory judgment that Georgia's procedures for voluntary commitment of children under the age of 18 to state mental hospitals violated the Due Process Clause of the Fourteenth Amendment, and requested an injunction against their future enforcement. Under the Georgia statute providing for the voluntary admission of children to state regional hospitals, admission begins with an application for hospitalization signed by a parent or guardian and, upon application, the superintendent of the hospital is authorized to admit temporarily any child for "observation and diagnosis." If after observation the superintendent finds "evidence of mental illness" and that the child is "suitable for treatment" in the hospital, the child may be admitted "for such period and under such conditions as may be authorized by law." Under Georgia's mental health statute, any child who has been hospitalized for more than five days may be discharged at the request of a parent or guardian, and the hospital superintendent, even without a request for discharge, has an affirmative duty to release any child "who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable." The District Court held that Georgia's statutory scheme was unconstitutional because it failed to protect adequately the appellees' due process rights and that the process due included at least the right after notice to an adversary-type hearing before an impartial tribunal.

Held: The District Court erred in holding unconstitutional the State's procedures for admitting a child for treatment to a state mental hospital, since on the record in this case, Georgia's medical factfinding processes are consistent with constitutional guarantees. Pp. 598–621.

(a) Testing challenged state procedures under a due process claim requires a balancing of (i) the private interest that will be affected by

the official action; (ii) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (iii) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 335; *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 848–849. Pp. 599–600.

(b) Notwithstanding a child's liberty interest in not being confined unnecessarily for medical treatment, and assuming that a person has a protectible interest in not being erroneously labeled as mentally ill, parents—who have traditional interests in and responsibility for the upbringing of their child—retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse. However, the child's rights and the nature of the commitment decision are such that parents do not always have absolute discretion to institutionalize a child; they retain plenary authority to seek such care for their children, subject to an independent medical judgment. Cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Wisconsin* v. *Yoder*, 406 U. S. 205; *Prince* v. *Massachusetts*, 321 U. S. 158; *Meyer* v. *Nebraska*, 262 U. S. 390. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, distinguished. Pp. 600–604.

(c) The State has significant interests in confining the use of costly mental health facilities to cases of genuine need, in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance, and in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming preadmission procedures. Pp. 604–606.

(d) The risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a "neutral factfinder" to determine whether the statutory requirements for admission are satisfied, see *Goldberg* v. *Kelly*, 397 U. S. 254, 271; *Morrissey* v. *Brewer*, 408 U. S. 471, 489, and to probe the child's background. The decisionmaker must have the authority to refuse to admit any child who does not satisfy the medical standards for admission. The need for continuing commitment must be reviewed periodically. Pp. 606–607.

(e) Due process does not require that the neutral factfinder be law trained or a judicial or administrative officer; nor is it necessary that the admitting physician conduct a formal or quasi-formal adversary hearing or that the hearing be conducted by someone other than the admitting physician. While the medical decisionmaking process may

not be error free, nevertheless the independent medical decisionmaking process, which includes a thorough psychiatric investigation followed by additional periodic review of a child's condition will identify children who should not be admitted; risks of error will not be significantly reduced by a more formal, judicial-type hearing. Pp. 607–613.

(f) Georgia's practices, as described in the record, comport with minimum due process requirements. The state statute envisions a careful diagnostic medical inquiry to be conducted by the admitting physician at each regional hospital. Georgia's procedures are not "arbitrary" in the sense that a single physician or other professional has the "unbridled discretion" to commit a child to a regional hospital. While Georgia's general administrative and statutory scheme for the voluntary commitment of children is not unconstitutional, the District Court, on remand, may consider any individual claims that the initial admissions of particular children did not meet due process standards, and may also consider whether the various hospitals' procedures for periodic review of their patients' need for institutional care are sufficient to justify *continuing* a voluntary commitment. Pp. 613–617.

(g) The differences between the situation where the child is a ward of the State of Georgia and the State requests his admission to a state mental hospital, and the situation where the child's natural parents request his admission, do not justify requiring different procedures at the time of the child's initial admission to the hospital. Pp. 617–620.

412 F. Supp. 112, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 621. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 625.

R. Douglas Lackey, Assistant Attorney General of Georgia, reargued the cause for appellants. With him on the briefs on the original argument were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, *Don A. Langham*, First Assistant Attorney General, *Michael J. Bowers*, Senior Assistant Attorney General, and *Carol Atha Cosgrove*, Assistant Attorney General.

John L. Cromartie, Jr., reargued the cause for appellees.

With him on the brief on the original argument was *Gerald R. Tarutis.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this appeal is what process is constitutionally due a minor child whose parents or guardian seek state administered institutional mental health care for the child and specifically whether an adversary proceeding is required prior to or after the commitment.

I

(a) Appellee [1] J. R., a child being treated in a Georgia state mental hospital, was a plaintiff in this class action [2] based on 42 U. S. C. § 1983, in the District Court for the Middle District of Georgia. Appellants are the State's Commissioner

*Briefs of *amici curiae* urging affirmance were filed by *William B. Spann, Jr., John H. Lashly,* and *Daniel L. Skoler* for the American Bar Association; by *Stephen P. Berzon, Marian Wright Edelman,* and *Paul R. Friedman* for the American Orthopsychiatric Association et al.; by *Joel I. Klein* for the American Psychiatric Association et al.; by *Robert L. Walker* for the Child Welfare League of America; by *Stanley C. Van Ness* for the Department of the Public Advocate, Division of Mental Health Advocacy of New Jersey; and by *Robert S. Catz* for the Urban Law Institute.

Solicitor General McCree, Assistant Attorney General Days, Brian K. Landsberg, and *Mark L. Gross* filed a brief for the United States as *amicus curiae.*

[1] Pending our review, one of the named plaintiffs before the District Court, J. L., died. Although the individual claim of J. L. is moot, we discuss the facts of this claim because, in part, they form the basis for the District Court's holding.

[2] The class certified by the District Court, without objection by appellants, consisted "of all persons younger than 18 years of age now or hereafter received by any defendant for observation and diagnosis and/or detained for care and treatment at any 'facility' within the State of Georgia pursuant to" Ga. Code § 88-503.1 (1975). Although one witness testified that on any given day there may be 200 children in the class, in December 1975 there were only 140.

of the Department of Human Resources, the Director of the Mental Health Division of the Department of Human Resources, and the Chief Medical Officer at the hospital where appellee was being treated. Appellee sought a declaratory judgment that Georgia's voluntary commitment procedures for children under the age of 18, Ga. Code §§ 88–503.1, 88–503.2 (1975),[3] violated the Due Process Clause of the Fourteenth Amendment and requested an injunction against their future enforcement.

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 (1970 ed.) and 2284. After considering expert and lay testimony and extensive exhibits and after visiting two of the State's regional mental health hospitals, the District Court held that Georgia's statutory scheme was unconstitutional because it failed to protect adequately the appellees' due process rights. *J. L.* v. *Parham*, 412 F. Supp. 112, 139 (1976).

To remedy this violation, the court enjoined future commitments based on the procedures in the Georgia statute. It also commanded Georgia to appropriate and expend whatever amount was "reasonably necessary" to provide nonhospital facilities deemed by the appellant state officials to be the

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[3] Section 88–503.1 provides:

"The superintendent of any facility may receive for observation and diagnosis . . . any individual under 18 years of age for whom such application is made by his parent or guardian . . . . If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law."

Section 88–503.2 provides:

"The superintendent of the facility shall discharge any voluntary patient who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable."

Section 88–503 was amended in some respects in 1978, but references herein are to the provisions in effect at the time in question.

most appropriate for the treatment of those members of plaintiffs' class, n. 2, *supra*, who could be treated in a less drastic, nonhospital environment. 412 F. Supp., at 139.

Appellants challenged all aspects of the District Court's judgment. We noted probable jurisdiction, 431 U. S. 936, and heard argument during the 1977 Term. The case was then consolidated with *Secretary of Public Welfare* v. *Institutionalized Juveniles, post,* p. 640, and reargued this Term.

(b) J. L., a plaintiff before the District Court who is now deceased, was admitted in 1970 at the age of 6 years to Central State Regional Hospital in Milledgeville, Ga. Prior to his admission, J. L. had received outpatient treatment at the hospital for over two months. J. L.'s mother then requested the hospital to admit him indefinitely.

The admitting physician interviewed J. L. and his parents. He learned that J. L.'s natural parents had divorced and his mother had remarried. He also learned that J. L. had been expelled from school because he was uncontrollable. He accepted the parents' representation that the boy had been extremely aggressive and diagnosed the child as having a "hyperkinetic reaction of childhood."

J. L.'s mother and stepfather agreed to participate in family therapy during the time their son was hospitalized. Under this program, J. L. was permitted to go home for short stays. Apparently his behavior during these visits was erratic. After several months, the parents requested discontinuance of the program.

In 1972, the child was returned to his mother and stepfather on a furlough basis, *i. e.*, he would live at home but go to school at the hospital. The parents found they were unable to control J. L. to their satisfaction, and this created family stress. Within two months, they requested his readmission to Central State. J. L.'s parents relinquished their parental rights to the county in 1974.

Although several hospital employees recommended that J. L.

should be placed in a special foster home with "a warm, supported, truly involved couple," the Department of Family and Children Services was unable to place him in such a setting. On October 24, 1975, J. L. (with J. R.) filed this suit requesting an order of the court placing him in a less drastic environment suitable to his needs.

(c) Appellee J. R. was declared a neglected child by the county and removed from his natural parents when he was 3 months old. He was placed in seven different foster homes in succession prior to his admission to Central State Hospital at the age of 7.

Immediately preceding his hospitalization, J. R. received outpatient treatment at a county mental health center for several months. He then began attending school where he was so disruptive and incorrigible that he could not conform to normal behavior patterns. Because of his abnormal behavior, J. R.'s seventh set of foster parents requested his removal from their home. The Department of Family and Children Services then sought his admission at Central State. The agency provided the hospital with a complete socio-medical history at the time of his admission. In addition, three separate interviews were conducted with J. R. by the admission team of the hospital.

It was determined that he was borderline retarded, and suffered an "unsocialized, aggressive reaction of childhood." It was recommended unanimously that he would "benefit from the structured environment" of the hospital and would "enjoy living and playing with boys of the same age."

J. R.'s progress was re-examined periodically. In addition, unsuccessful efforts were made by the Department of Family and Children Services during his stay at the hospital to place J. R. in various foster homes. On October 24, 1975, J. R. (with J. L.) filed this suit requesting an order of the court placing him in a less drastic environment suitable to his needs.

(d) Georgia Code § 88–503.1 (1975) provides for the volun-

tary admission to a state regional hospital of children such as J. L. and J. R. Under that provision, admission begins with an application for hospitalization signed by a "parent or guardian." Upon application, the superintendent of each hospital is given the power to admit temporarily any child for "observation and diagnosis." If, after observation, the superintendent finds "evidence of mental illness" and that the child is "suitable for treatment" in the hospital, then the child may be admitted "for such period and under such conditions as may be authorized by law."

Georgia's mental health statute also provides for the discharge of voluntary patients. Any child who has been hospitalized for more than five days may be discharged at the request of a parent or guardian. § 88–503.3 (a) (1975). Even without a request for discharge, however, the superintendent of each regional hospital has an affirmative duty to release any child "who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable." § 88–503.2 (1975).

Georgia's Mental Health Director has not published any statewide regulations defining what specific procedures each superintendent must employ when admitting a child under 18. Instead, each regional hospital's superintendent is responsible for the procedures in his or her facility. There is substantial variation among the institutions with regard to their admission procedures and their procedures for review of patients after they have been admitted. A brief description of the different hospitals' procedures[4] will demonstrate the variety of

[4] Although the State has eight regional hospitals, superintendents from only seven of them were deposed. In addition, the District Court referred to only seven hospitals in its list of members of the plaintiff class. Apparently, the eighth hospital, Northwest Regional in Rome, Ga., had no children being treated there. The District Court's order was issued against the State Commissioner of the Department of Human Resources, who is

approaches taken by the regional hospitals throughout the State.

Southwestern Hospital in Thomasville, Ga., was built in 1966. Its children and adolescent program was instituted in 1974. The children and adolescent unit in the hospital has a maximum capacity of 20 beds, but at the time of suit only 10 children were being treated there.

The Southwestern superintendent testified that the hospital has never admitted a voluntary child patient who was not treated previously by a community mental health clinic. If a mental health professional at the community clinic determines that hospital treatment may be helpful for a child, then clinic staff and hospital staff jointly evaluate the need for hospitalization, the proper treatment during hospitalization, and a likely release date. The initial admission decision thus is not made at the hospital.

After a child is admitted, the hospital has weekly reviews of his condition performed by its internal medical and professional staff. There also are monthly reviews of each child by a group composed of hospital staff not involved in the weekly reviews and by community clinic staff people. The average stay for each child who was being treated at Southwestern in 1975 was 100 days.

Atlanta Regional Hospital was opened in 1968. At the time of the hearing before the District Court, 17 children and 21 adolescents were being treated in the hospital's children and adolescent unit.

The hospital is affiliated with nine community mental health centers and has an agreement with them that "persons will be treated in the comprehensive community mental health centers in every possible instance, rather than being hospitalized." The admission criteria at Atlanta Regional for voluntary and involuntary patients are the same. It has a formal policy not

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responsible for the activities of all eight hospitals, including Northwest Regional.

to admit a voluntary patient unless the patient is found to be a threat to himself or others. The record discloses that approximately 25% of all referrals from the community centers are rejected by the hospital admissions staff.

After admission, the staff reviews the condition of each child every week. In addition, there are monthly utilization reviews by nonstaff mental health professionals; this review considers a random sample of children's cases. The average length of each child's stay in 1975 was 161 days.

The Georgia Mental Health Institute (GMHI) in Decatur, Ga., was built in 1965. Its children and adolescent unit housed 26 children at the time this suit was brought.

The hospital has a formal affiliation with four community mental health centers. Those centers may refer patients to the hospital only if they certify that "no appropriate alternative resources are available within the client's geographic area." For the year prior to the trial in this case, no child was admitted except through a referral from a clinic. Although the hospital has a policy of generally accepting for 24 hours all referrals from a community clinic, it has a team of staff members who review each admission. If the team finds "no reason not to treat in the community" and the deputy superintendent of the hospital agrees, then it will release the applicant to his home.

After a child is admitted, there must be a review of the admission decision within 30 days. There is also an unspecified periodic review of each child's need for hospitalization by a team of staff members. The average stay for the children who were at GMHI in 1975 was 346 days.

Augusta Regional Hospital was opened in 1969 and is affiliated with 10 community mental health clinics. Its children and adolescent unit housed 14 children in December 1975.

Approximately 90% of the children admitted to the hospital have first received treatment in the community, but not all of them were admitted based on a specific referral from a clinic.

The admission criterion is whether "the child needs hospitalization," and that decision must be approved by two psychiatrists. There is also an informal practice of not admitting a child if his parents refuse to participate in a family therapy program.

The admission decision is reviewed within 10 days by a team of staff physicians and mental health professionals; thereafter, each child is reviewed every week. In addition, every child's condition is reviewed by a team of clinic staff members every 100 days. The average stay for the children at Augusta in December 1975 was 92 days.

Savannah Regional Hospital was built in 1970, and it housed 16 children at the time of this suit. The hospital staff members are also directors of the community mental health clinics.

It is the policy of the hospital that any child seeking admission on a nonemergency basis must be referred by a community clinic. The admission decision must be made by a staff psychiatrist, and it is based on the materials provided by the community clinic, an interview with the applicant, and an interview with the parents, if any, of the child.

Within three weeks after admission of a child, there is review by a group composed of hospital and clinic staff members and people from the community, such as juvenile court judges. Thereafter, the hospital staff reviews each child weekly. If the staff concludes that a child is ready to be released, then the community committee reviews the child's case to assist in placement. The average stay of the children being treated at Savannah in December 1975 was 127 days.

West Central Hospital in Columbus, Ga., was opened in December 1974, and it was organized for budgetary purposes with several community mental health clinics. The hospital itself has only 20 beds for children and adolescents, 16 of which were occupied at the time this suit was filed.

There is a formal policy that all children seeking admission to the hospital must be referred by a community clinic. The hospital is regarded by the staff as "the last resort in treating

a child"; 50% of the children referred are turned away by the admissions team at the hospital.

After admission, there are staff meetings daily to discuss problem cases. The hospital has a practicing child psychiatrist who reviews cases once a week. Depending on the nature of the problems, the consultant reviews between 1 and 20 cases. The average stay of the children who were at West Central in December 1975 was 71 days.

The children's unit at Central State Regional Hospital in Milledgeville, Ga., was added to the existing structure during the 1970's. It can accommodate 40 children. The hospital also can house 40 adolescents. At the time of suit, the hospital housed 37 children under 18, including both named plaintiffs.

Although Central State is affiliated with community clinics, it seems to have a higher percentage of nonreferral admissions than any of the other hospitals. The admission decision is made by an "admissions evaluator" and the "admitting physician." The evaluator is a Ph. D. in psychology, a social worker, or a mental-health-trained nurse. The admitting physician is a psychiatrist. The standard for admission is "whether or not hospitalization is the more appropriate treatment" for the child. From April 1974 to November 1975, 9 of 29 children applicants screened for admission were referred to noninstitutional settings.

All children who are temporarily admitted are sent to the children and adolescent unit for testing and development of a treatment plan. Generally, seven days after the admission, members of the hospital staff review all of the information compiled about a patient "to determine the need for continued hospitalization." Thereafter, there is an informal review of the patient approximately every 60 days. The patients who were at Central State in December 1975 had been there, on the average, 456 days. There is no explanation in the record for this large variation from the average length of hospitalization at the other institutions.

Although most of the focus of the District Court was on the State's mental hospitals, it is relevant to note that Georgia presently funds over 50 community mental health clinics and 13 specialized foster care homes. The State has built seven new regional hospitals within the past 15 years, and it has added a new children's unit to its oldest hospital. The state budget in fiscal year 1976 was almost $150 million for mental health care. Georgia ranks 22d among the states in per capita expenditures for mental health and 15th in total expenditures.[5]

The District Court nonetheless rejected the State's entire system of providing mental health care on both procedural and substantive grounds. The District Court found that 46 children could be "optimally cared for in another, less restrictive, non-hospital setting if it were available." 412 F. Supp., at 124–125. These "optimal" settings included group homes, therapeutic camps, and home-care services. The Governor of Georgia and the chairmen of the two Appropriations Committees of its legislature, testifying in the District Court, expressed confidence in the Georgia program and informed the court that the State could not justify enlarging its budget during fiscal year 1977 to provide the specialized treatment settings urged by appellees in addition to those then available.

Having described the factual background of Georgia's mental health program and its treatment of the named plaintiffs, we turn now to examine the legal bases for the District Court's judgment.

II

In holding unconstitutional Georgia's statutory procedure for voluntary commitment of juveniles, the District Court first determined that commitment to any of the eight regional

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[5] The source for these data is National Association of State Mental Health Program Directors, State Report: State Mental Health Agency Expenditures (Aug. 1, 1978).

hospitals [6] constitutes a severe deprivation of a child's liberty. The court defined this liberty interest in terms of both freedom from bodily restraint and freedom from the "emotional and psychic harm" caused by the institutionalization.[7] Having determined that a liberty interest is implicated by a child's admission to a mental hospital, the court considered what process is required to protect that interest. It held that the process due "includes at least the right after notice to be heard before an impartial tribunal." 412 F. Supp., at 137.

In requiring the prescribed hearing, the court rejected Georgia's argument that no adversary-type hearing was required since the State was merely assisting parents who could not afford private care by making available treatment similar to that offered in private hospitals and by private physicians. The court acknowledged that most parents who seek to have their children admitted to a state mental hospital do so in good faith. It, however, relied on one of appellees' witnesses who expressed an opinion that "some still look upon mental hospitals as a 'dumping ground.'" *Id.*, at 138.[8] No specific

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[6] The record is very sparse with regard to the physical facilities and daily routines at the various regional hospitals. The only hospital discussed by appellees' expert witness was Central State. The District Court visited Central State and one other hospital, but did not discuss the visits in its opinion.

[7] In both respects, the District Court found strong support for its holding in this Court's decision in *In re Gault*, 387 U. S. 1 (1967). In that decision, we held that a state cannot institutionalize a juvenile delinquent without first providing certain due process protections.

[8] In light of the District Court's holding that a judicial or quasi-judicial body should review voluntary commitment decisions, it is at least interesting to note that the witness who made the statement quoted in the text was not referring to parents as the people who "dump" children into hospitals. This witness opined that some juvenile court judges and child welfare agencies misused the hospitals. App. 768. See also Rolfe & MacClintock, The Due Process Rights of Minors "Voluntarily Admitted" to Mental Institutions, 4 J. Psychiatry & L. 333, 351 (1976) (hereinafter Rolfe & MacClintock).

evidence of such "dumping," however, can be found in the record.

The District Court also rejected the argument that review by the superintendents of the hospitals and their staffs was sufficient to protect the child's liberty interest. The court held that the inexactness of psychiatry, coupled with the possibility that the sources of information used to make the commitment decision may not always be reliable, made the superintendent's decision too arbitrary to satisfy due process. The court then shifted its focus drastically from what was clearly a procedural due process analysis to what appears to be a substantive due process analysis and condemned Georgia's "officialdom" for its failure, in the face of a state-funded 1973 report [9] outlining the "need" for additional resources to be spent on nonhospital treatment, to provide more resources for noninstitutional mental health care. The court concluded that there was a causal relationship between this intransigence and the State's ability to provide any "flexible due process" to the appellees. The District Court therefore ordered the State to appropriate and expend such resources as would be necessary to provide nonhospital treatment to those members of appellees' class who would benefit from it.

III

In an earlier day, the problems inherent in coping with children afflicted with mental or emotional abnormalities were dealt with largely within the family. See S. Brakel & R. Rock, The Mentally Disabled and the Law 4 (1971). Sometimes parents were aided by teachers or a family doctor. While some parents no doubt were able to deal with their disturbed

[9] This study was conducted by the Study Commission on Mental Health Services for Children and Youth and was financed by the State of Georgia. The Commission was made up of eight distinguished scholars in the field of mental health. They spent six months studying the five regional hospitals that were in existence at that time.

children without specialized assistance, others, especially those of limited means and education, were not. Increasingly, they turned for assistance to local, public sources or private charities. Until recently, most of the states did little more than provide custodial institutions for the confinement of persons who were considered dangerous. *Id.*, at 5–6; Slovenko, Criminal Justice Procedures in Civil Commitment, 24 Wayne L. Rev. 1, 3 (1977) (hereinafter Slovenko).

As medical knowledge about the mentally ill and public concern for their condition expanded, the states, aided substantially by federal grants,[10] have sought to ameliorate the human tragedies of seriously disturbed children. Ironically, as most states have expanded their efforts to assist the mentally ill, their actions have been subjected to increasing litigation and heightened constitutional scrutiny. Courts have been required to resolve the thorny constitutional attacks on state programs and procedures with limited precedential guidance. In this case, appellees have challenged Georgia's procedural and substantive balance of the individual, family, and social interests at stake in the voluntary commitment of a child to one of its regional mental hospitals.

The parties agree that our prior holdings have set out a general approach for testing challenged state procedures under a due process claim. Assuming the existence of a protectible property or liberty interest, the Court has required a balancing of a number of factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

[10] See, *e. g.*, Community Health Centers Act, 77 Stat. 290, as amended, 42 U. S. C. § 2689 *et seq.*

procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), quoted in *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 848–849 (1977).

In applying these criteria, we must consider first the child's interest in not being committed. Normally, however, since this interest is inextricably linked with the parents' interest in and obligation for the welfare and health of the child, the private interest at stake is a combination of the child's and parents' concerns.[11] Next, we must examine the State's interest in the procedures it has adopted for commitment and treatment of children. Finally, we must consider how well Georgia's procedures protect against arbitrariness in the decision to commit a child to a state mental hospital.

(a) It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment. See *Addington* v. *Texas*, 441 U. S. 418, 425 (1979); *In re Gault*, 387 U. S. 1, 27 (1967); *Specht* v. *Patterson*, 386 U. S. 605 (1967). We also recognize that commitment sometimes produces adverse social consequences for the child because of the reaction of some to the discovery that the child has received psychiatric care. Cf. *Addington* v. *Texas*, *supra*, at 425–426.

This reaction, however, need not be equated with the community response resulting from being labeled by the state as delinquent, criminal, or mentally ill and possibly dangerous. See *ibid.*; *In re Gault*, *supra*, at 23; *Paul* v. *Davis*, 424 U. S. 693, 711–712 (1976). The state through its voluntary commitment procedures does not "label" the child; it provides a

[11] In this part of the opinion, we will deal with the issues arising when the natural parents of the child seek commitment to a state hospital. In Part IV, we will deal with the situation presented when the child is a ward of the state.

diagnosis and treatment that medical specialists conclude the child requires. In terms of public reaction, the child who exhibits abnormal behavior may be seriously injured by an erroneous decision not to commit. Appellees overlook a significant source of the public reaction to the mentally ill, for what is truly "stigmatizing" is the symptomatology of a mental or emotional illness. *Addington* v. *Texas, supra,* at 429. See also Schwartz, Myers, & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Archives of General Psychiatry 329 (1974).[12] The pattern of untreated, abnormal behavior—even if nondangerous—arouses at least as much negative reaction as treatment that becomes public knowledge. A person needing, but not receiving, appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder.[13]

However, we need not decide what effect these factors might have in a different case. For purposes of this decision, we assume that a child has a protectible interest not only in being free of unnecessary bodily restraints but also in not being labeled erroneously by some persons because of an improper decision by the state hospital superintendent.

(b) We next deal with the interests of the parents who have decided, on the basis of their observations and independent professional recommendations, that their child needs institu-

[12] See also Gove & Fain, The Stigma of Mental Hospitalization, 28 Archives of General Psychiatry 494, 500 (1973); Phillips, Rejection of the Mentally Ill: The Influence of Behavior and Sex, 29 Am. Sociological Rev. 679, 686–687 (1964). Research by Schwartz, Myers, and Astrachan and that of Gove and Fain found "that the stigma of mental hospitalization is not a major problem for the ex-patient." Schwartz, Myers, & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Archives of General Psychiatry 329, 333 (1974).

[13] As Schwartz, Myers, and Astrachan concluded:

"Discharge [from a mental hospital] before disturbed behavior is well controlled may advance the patient into an inhospitable world that can incubate the chronicity that was to be avoided in the first place." *Id.,* at 334.

tional care. Appellees argue that the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interests in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment.

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925). See also *Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972); *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); *Meyer* v. *Nebraska,* 262 U. S. 390, 400 (1923). Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" as was stated in *Bartley* v. *Kremens,* 402 F. Supp. 1039, 1047–1048 (ED Pa. 1975), vacated and remanded, 431 U. S. 119 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the

child's best interests. See Rolfe & MacClintock 348–349. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.

Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized. See *Wisconsin* v. *Yoder, supra,* at 230; *Prince* v. *Massachusetts, supra,* at 166. Moreover, the Court recently declared unconstitutional a state statute that granted parents an absolute veto over a minor child's decision to have an abortion. *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52 (1976). Appellees urge that these precedents limiting the traditional rights of parents, if viewed in the context of the liberty interest of the child and the likelihood of parental abuse, require us to hold that the parents' decision to have a child admitted to a mental hospital must be subjected to an exacting constitutional scrutiny, including a formal, adversary, pre-admission hearing.

Appellees' argument, however, sweeps too broadly. Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments. Here, there is no finding by the District Court of even a single instance of bad faith by any parent of any member of appellees' class. We cannot assume that the result in *Meyer* v. *Nebraska, supra,* and *Pierce* v. *Society of Sisters, supra,* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church,

school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child. See generally Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L. J. 645, 664–668 (1977); Bennett, Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis, 62 Va. L. Rev. 285, 308 (1976). Neither state officials nor federal courts are equipped to review such parental decisions.

Appellees place particular reliance on *Planned Parenthood,* arguing that its holding indicates how little deference to parents is appropriate when the child is exercising a constitutional right. The basic situation in that case, however, was very different; *Planned Parenthood* involved an absolute parental veto over the child's ability to obtain an abortion. Parents in Georgia in no sense have an absolute right to commit their children to state mental hospitals; the statute requires the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement. See *supra,* at 591.

In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.

(c) The State obviously has a significant interest in con-

fining the use of its costly mental health facilities to cases of genuine need. The Georgia program seeks first to determine whether the patient seeking admission has an illness that calls for inpatient treatment. To accomplish this purpose, the State has charged the superintendents of each regional hospital with the responsibility for determining, before authorizing an admission, whether a prospective patient is mentally ill and whether the patient will likely benefit from hospital care. In addition, the State has imposed a continuing duty on hospital superintendents to release any patient who has recovered to the point where hospitalization is no longer needed.

The State in performing its voluntarily assumed mission also has a significant interest in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance. The *parens patriae* interest in helping parents care for the mental health of their children cannot be fulfilled if the parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing, or too contentious. It is surely not idle to speculate as to how many parents who believe they are acting in good faith would forgo state-provided hospital care if such care is contingent on participation in an adversary proceeding designed to probe their motives and other private family matters in seeking the voluntary admission.

The State also has a genuine interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedural minuets before the admission.[14] One factor that must

[14] Judge Friendly has cogently pointed out:

"It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the

be considered is the utilization of the time of psychiatrists, psychologists, and other behavioral specialists in preparing for and participating in hearings rather than performing the task for which their special training has fitted them. Behavioral experts in courtrooms and hearings are of little help to patients.

The *amici* brief of the American Psychiatric Association et al. points out at page 20 that the average staff psychiatrist in a hospital presently is able to devote only 47% of his time to direct patient care. One consequence of increasing the procedures the state must provide prior to a child's voluntary admission will be that mental health professionals will be diverted even more from the treatment of patients in order to travel to and participate in—and wait for—what could be hundreds—or even thousands—of hearings each year. Obviously the cost of these procedures would come from the public moneys the legislature intended for mental health care. See Slovenko 34–35.

(d) We now turn to consideration of what process protects adequately the child's constitutional rights by reducing risks of error without unduly trenching on traditional parental authority and without undercutting "efforts to further the legitimate interests of both the state and the patient that are served by" voluntary commitments. *Addington* v. *Texas*, 441 U. S., at 430. See also *Mathews* v. *Eldridge*, 424 U. S., at 335. We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a "neutral factfinder" to determine whether the statutory requirements for admission are satisfied. See *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970); *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972). That inquiry must care-

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deserving." Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1276 (1975). See also *Wheeler* v. *Montgomery*, 397 U. S. 280, 282 (1970) (dissenting opinion).

fully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure.[15]

We are satisfied that such procedures will protect the child from an erroneous admission decision in a way that neither unduly burdens the states nor inhibits parental decisions to seek state help.

Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer. See *Goldberg* v. *Kelly, supra,* at 271; *Morrissey* v. *Brewer, supra,* at 489. Surely, this is the case as to medical decisions, for "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." *In re Roger S.,* 19 Cal. 3d 921, 942, 569 P. 2d 1286, 1299 (1977) (Clark, J., dissenting). Thus, a staff physician will suffice, so long as he or she is free to evaluate independently the child's mental and emotional condition and need for treatment.

It is not necessary that the deciding physician conduct a formal or quasi-formal hearing. A state is free to require such a hearing, but due process is not violated by use of informal, traditional medical investigative techniques. Since well-established medical procedures already exist, we do not undertake to outline with specificity precisely what this investigation must involve. The mode and procedure of medical

[15] As we discuss more fully later, *infra,* at 617, the District Court did not decide and we therefore have no reason to consider at this time what procedures for review are independently necessary to justify continuing a child's confinement. We merely hold that a subsequent, independent review of the patient's condition provides a necessary check against possible arbitrariness in the *initial* admission decision.

diagnostic procedures is not the business of judges. What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case. We do no more than emphasize that the decision should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted.

What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made. Not every determination by state officers can be made most effectively by use of "the procedural tools of judicial or administrative decisionmaking." *Board of Curators of Univ. of Missouri* v. *Horowitz*, 435 U. S. 78, 90 (1978). See also *Greenholtz* v. *Nebraska Penal Inmates*, *ante*, at 13–14; *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).[16]

[16] Relying on general statements from past decisions dealing with governmental actions not even remotely similar to those involved here, the dissent concludes that if a protectible interest is involved then there must be some form of traditional, adversary, judicial, or administrative hearing either before or after its deprivation. That result is mandated, in their view, regardless of what process the state has designed to protect the individual and regardless of what the record demonstrates as to the fairness of the state's approach.

The dissenting approach is inconsistent with our repeated assertion that "due process is *flexible* and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972) (emphasis added). Just as there is no requirement as to exactly what procedures to employ whenever a traditional judicial-type hearing is mandated, compare *Goss* v. *Lopez*, 419 U. S. 565 (1975); *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Morrissey* v. *Brewer*, *supra*, with *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), there is no reason to require a judicial-type hearing in all circumstances. As the scope of governmental action expands into new areas creating new controversies for judicial review, it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems. The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.

Here, the questions are essentially medical in character: whether the child is mentally or emotionally ill and whether he can benefit from the treatment that is provided by the state. While facts are plainly necessary for a proper resolution of those questions, they are only a first step in the process. In an opinion for a unanimous Court, we recently stated in *Addington* v. *Texas*, 441 U. S., at 429, that the determination of whether a person is mentally ill "turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists."

Although we acknowledge the fallibility of medical and psychiatric diagnosis, see *O'Connor* v. *Donaldson*, 422 U. S. 563, 584 (1975) (concurring opinion), we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing. Even after a hearing, the nonspecialist decisionmaker must make a medical-psychiatric decision. Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real. See Albers, Pasewark, & Meyer, Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception, 6 Cap. U. L. Rev. 11, 15 (1976).[17]

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[17] See Albers & Pasewark, Involuntary Hospitalization: Surrender at the Courthouse, 2 Am. J. Community Psychology 287, 288 (1974) (mean hearing time for 21 of 300 consecutive commitment cases was 9.2 minutes); Miller & Schwartz, County Lunacy Commission Hearings: Some Observations of Commitments to a State Mental Hospital, 14 Social Prob. 26 (1966) (mean time for hearings was 3.8 minutes); Scheff, The Societal Reaction to Deviance: Ascriptive Elements in the Psychiatric Screening of Mental

Another problem with requiring a formalized, factfinding hearing lies in the danger it poses for significant intrusion into the parent-child relationship. Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child. It is one thing to require a neutral physician to make a careful review of the parents' decision in order to make sure it is proper from a medical standpoint; it is a wholly different matter to employ an adversary contest to ascertain whether the parents' motivation is consistent with the child's interests.

Moreover, it is appropriate to inquire into how such a hearing would contribute to the successful long-range treatment of the patient. Surely, there is a risk that it would exacerbate whatever tensions already exist between the child and the parents. Since the parents can and usually do play a significant role in the treatment while the child is hospitalized and even more so after release, there is a serious risk that an adversary confrontation will adversely affect the ability of the parents to assist the child while in the hospital. Moreover, it will make his subsequent return home more difficult. These unfortunate results are especially critical with an emotionally disturbed child; they seem likely to occur in the context of an adversary hearing in which the parents testify. A confrontation over such intimate family relationships would distress the normal adult parents and the impact on a disturbed child almost certainly would be significantly greater.[18]

Patients in a Midwestern State, 11 Social Prob. 401 (1964) (average hearing lasted 9.2 minutes). See also Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 Texas L. Rev. 424 (1966).

[18] While not altogether clear, the District Court opinion apparently contemplated a hearing preceded by a written notice of the proposed commitment. At the hearing the child presumably would be given an opportunity to be heard and present evidence, and the right to cross-examine witnesses, including, of course, the parents. The court also

It has been suggested that a hearing conducted by someone other than the admitting physician is necessary in order to detect instances where parents are "guilty of railroading their children into asylums" or are using "voluntary commitment procedures in order to sanction behavior of which they disapprov[e]." Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Calif. L. Rev. 840, 850–851 (1974). See also *J. L.* v. *Parham*, 412 F. Supp., at 133; Brief for Appellees 38. Curiously, it seems to be taken for granted that parents who seek to "dump" their children on the state will inevitably be able to conceal their motives and thus deceive the admitting psychiatrists and the other mental health professionals who make and review the admission decision. It is elementary that one early diagnostic inquiry into the cause of an emotional disturbance of a child is an examination into the environment of the child. It is unlikely, if not inconceivable, that a decision to abandon an emotionally normal, healthy child and thrust him into an institution will be a discrete act leaving no trail of circumstances. Evidence of such conflicts will emerge either in the interviews or from secondary sources. It is unrealistic to believe that trained psychiatrists, skilled in eliciting responses, sorting medically relevant facts, and sensing motivational nuances will often be deceived about the family situation surrounding

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required an impartial trier of fact who would render a written decision reciting the reasons for accepting or rejecting the parental application.

Since the parents in this situation are seeking the child's admission to the state institution, the procedure contemplated by the District Court presumably would call for some other person to be designated as a guardian *ad litem* to act for the child. The guardian, in turn, if not a lawyer, would be empowered to retain counsel to act as an advocate of the child's interest.

Of course, a state may elect to provide such adversary hearings in situations where it perceives that parents and a child may be at odds, but nothing in the Constitution compels such procedures.

a child's emotional disturbance.[19] Surely a lay, or even law-trained, factfinder would be no more skilled in this process than the professional.

By expressing some confidence in the medical decision-making process, we are by no means suggesting it is error free. On occasion, parents may initially mislead an admitting physician or a physician may erroneously diagnose the child as needing institutional care either because of negligence or an overabundance of caution. That there may be risks of error in the process affords no rational predicate for holding unconstitutional an entire statutory and administrative scheme that is generally followed in more than 30 states.[20] "[P]ro-

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[19] In evaluating the problem of detecting "dumping" by parents, it is important to keep in mind that each of the regional hospitals has a continuing relationship with the Department of Family and Children Services. The staffs at those hospitals refer cases to the Department when they suspect a child is being mistreated and thus are sensitive to this problem. In fact, J. L.'s situation is in point. The family conflicts and problems were well documented in the hospital records. Equally well documented, however, were the child's severe emotional disturbances and his need for treatment.

[20] Alaska Stat. Ann. § 47.30.020 (1975); Ariz. Rev. Stat. Ann. §§ 36–518, 36–519 (1974); Ark. Stat. Ann. § 59–405 (B) (1971); Cal. Welf. & Inst. Code Ann. § 6000 (West Supp. 1979); D. C. Code §§ 21–511, 21–512 (1973); Fla. Stat. § 394.465 (1)(a) (Supp. 1979); Ga. Code §§ 88–503.1, 88–503.2 (1978); Haw. Rev. Stat. § 334–60 (a)(2) (1976) (only for child less than 15); Idaho Code §§ 66–318, 66–320 (Supp. 1978) (parent may admit child under 14, but child over 16 may obtain release); Ill. Rev. Stat., ch. 91½, §§ 3–502, 3–503 (Supp. 1978); Ind. Code § 16–14–9.1–2 (1976); Kan. Stat. Ann. §§ 59–2905, 59–2907 (Supp. 1978); Ky. Rev. Stat. § 202A.020 (1977); La. Rev. Stat. Ann. § 28:57 (C) (West Supp. 1979); Md. Ann. Code, Art. 59, § 11 (g) (Supp. 1978) (parental consent permissible only to some facilities); Mass. Gen. Laws Ann., ch. 123, § 10 (a) (West Supp. 1979); Mich. Comp. Laws § 330.1415 (1976) (child may object within 30 days and receive a hearing); Miss. Code Ann. § 41–21–103 (1) (Supp. 1978) (certificate of need for treatment from two physicians required); Mo. Rev. Stat. §§ 202.115 (1)(2), 202.115 (2)(2) (1978); Nev. Rev. Stat. §§ 422A.560, 433A.540 (1975); N. Y. Mental Hyg. Law § 9.13

cedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U. S., at 344. In general, we are satisfied that an independent medical decisionmaking process, which includes the thorough psychiatric investigation described earlier, followed by additional periodic review of a child's condition, will protect children who should not be admitted; we do not believe the risks of error in that process would be significantly reduced by a more formal, judicial-type hearing. The issue remains whether the Georgia practices, as described in the record before us, comport with these minimum due process requirements.

(e) Georgia's statute envisions a careful diagnostic medical inquiry to be conducted by the admitting physician at each regional hospital. The *amicus* brief for the United States explains, at pages 7–8:

> "[I]n every instance the decision whether or not to accept the child for treatment is made by a physician employed by the State . . . .
>
> "That decision is based on interviews and recommendations by hospital or community health center staff. The staff interviews the child and the parent or guardian who brings the child to the facility . . . [and] attempts are

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(McKinney 1978) (parent may admit, but child may obtain own release); N. D. Cent. Code § 25-03.1-04 (Supp. 1977); Ohio Rev. Code Ann. § 5122.02 (B) (Supp. 1978); Okla. Stat., Tit. 43A, § 184 (1971); Ore. Rev. Stat. § 426.220 (1) (1977); Pa. Stat. Ann., Tit. 50, § 7201 (Purdon Supp. 1978–1979) (only for child less than 14); R. I. Gen. Laws § 26-2-8 (Supp. 1978) (requires certificate of two physicians that child is insane); S. C. Code § 44-17-310 (2) (Supp. 1978); S. D. Comp. Laws Ann. § 27A-8-2 (1976); Tenn. Code Ann. § 33-601 (a)(1) (1977); Utah Code Ann §§ 64-7-29, 64-7-31 (2) (1953); Wash. Rev. Code § 72.23.070 (2) (1978) (child over 13 also must consent); W. Va. Code § 27-4-1 (b) (1976) (consent of child over 12 required); Wyo. Stat. § 25-3-106 (a)(i) (1977).

made to communicate with other possible sources of information about the child . . . ."

Focusing primarily on what it saw as the absence of any formal mechanism for review of the physician's initial decision, the District Court unaccountably saw the medical decision as an exercise of "unbridled discretion." 412 F. Supp., at 136. But extravagant characterizations are no substitute for careful analysis, and we must examine the Georgia process in its setting to determine if, indeed, any one person exercises such discretion.

In the typical case, the parents of a child initially conclude from the child's behavior that there is some emotional problem—in short, that "something is wrong." They may respond to the problem in various ways, but generally the first contact with the State occurs when they bring the child to be examined by a psychologist or psychiatrist at a community mental health clinic.

Most often, the examination is followed by outpatient treatment at the community clinic. In addition, the child's parents are encouraged, and sometimes required, to participate in a family therapy program to obtain a better insight into the problem. In most instances, this is all the care a child requires. However, if, after a period of outpatient care, the child's abnormal emotional condition persists, he may be referred by the local clinic staff to an affiliated regional mental hospital.

At the regional hospital an admissions team composed of a psychiatrist and at least one other mental health professional examines and interviews the child—privately in most instances. This team then examines the medical records provided by the clinic staff and interviews the parents. Based on this information, and any additional background that can be obtained, the admissions team makes a diagnosis and determines whether the child will likely benefit from institution-

alized care. If the team finds either condition not met, admission is refused.

If the team admits a child as suited for hospitalization, the child's condition and continuing need for hospital care are reviewed periodically by at least one independent, medical review group. For the most part, the reviews are as frequent as weekly, but none are less often than once every two months. Moreover, as we noted earlier, the superintendent of each hospital is charged with an affirmative statutory duty to discharge any child who is no longer mentally ill or in need of therapy.[21]

As with most medical procedures, Georgia's are not totally free from risk of error in the sense that they give total or absolute assurance that every child admitted to a hospital has a mental illness optimally suitable for institutionalized treatment. But it bears repeating that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge, supra,* at 344.

Georgia's procedures are not "arbitrary" in the sense that a single physician or other professional has the "unbridled discretion" the District Court saw to commit a child to a regional hospital. To so find on this record would require us to assume that the physicians, psychologists, and mental health professionals who participate in the admission decision and who review each other's conclusions as to the continuing validity of the initial decision are either oblivious or indifferent to the child's welfare—or that they are incompetent. We note, however, the District Court found to the contrary; it was "impressed by the conscientious, dedicated state em-

[21] While the record does demonstrate that the procedures may vary from case to case, it also reflects that no child in Georgia was admitted for indefinite hospitalization without being interviewed personally and without the admitting physician's checking with secondary sources, such as school or work records.

ployed psychiatrists who, with the help of equally conscientious, dedicated state employed psychologists and social workers, faithfully care for the plaintiff children . . . ." 412 F. Supp., at 138.

This finding of the District Court also effectively rebuts the suggestion made in some of the briefs *amici* that hospital administrators may not actually be "neutral and detached" because of institutional pressure to admit a child who has no need for hospital care. That such a practice may take place in some institutions in some places affords no basis for a finding as to Georgia's program; the evidence in the record provides no support whatever for that charge against the staffs at any of the State's eight regional hospitals. Such cases, if they are found, can be dealt with individually; [22] they do not lend themselves to class-action remedies.

We are satisfied that the voluminous record as a whole supports the conclusion that the admissions staffs of the hospitals have acted in a neutral and detached fashion in making medical judgments in the best interests of the children. The State, through its mental health programs, provides the authority for trained professionals to assist parents in examining, diagnosing, and treating emotionally disturbed children. Through its hiring practices, it provides well-staffed and well-equipped hospitals and—as the District Court found—conscientious public employees to implement the State's beneficent purposes.

Although our review of the record in this case satisfies us that Georgia's general administrative and statutory scheme for the voluntary commitment of children is not *per se*

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[22] One important means of obtaining individual relief for these children is the availability of habeas corpus. As the appellants' brief explains, "Ga. Code § 88–502.11 . . . provides that at any time and without notice a person detained in a facility, or a relative or friend of such person, may petition for a writ of habeas corpus to question the cause and legality of the detention of the person." Brief for Appellants 36–37.

unconstitutional, we cannot decide on this record whether every child in appellees' class received an adequate, independent diagnosis of his emotional condition and need for confinement under the standards announced earlier in this opinion. On remand, the District Court is free to and should consider any individual claims that initial admissions did not meet the standards we have described in this opinion.

In addition, we note that appellees' original complaint alleged that the State had failed to provide adequate periodic review of their need for institutional care and claimed that this was an additional due process violation. Since the District Court held that the appellees' original confinement was unconstitutional, it had no reason to consider this separate claim. Similarly, we have no basis for determining whether the review procedures of the various hospitals are adequate to provide the process called for or what process might be required if a child contests his confinement by requesting a release. These matters require factual findings not present in the District Court's opinion. We have held that the periodic reviews described in the record reduce the risk of error in the initial admission and thus they are necessary. Whether they are sufficient to justify continuing a voluntary commitment is an issue for the District Court on remand. The District Court is free to require additional evidence on this issue.

IV

(a) Our discussion in Part III was directed at the situation where a child's natural parents request his admission to a state mental hospital. Some members of appellees' class, including J. R., were wards of the State of Georgia at the time of their admission. Obviously their situation differs from those members of the class who have natural parents. While the determination of what process is due varies somewhat when the state, rather than a natural parent, makes the request for commitment, we conclude that the differences

in the two situations do not justify requiring different procedures at the time of the child's initial admission to the hospital.

For a ward of the state, there may well be no adult who knows him thoroughly and who cares for him deeply. Unlike with natural parents where there is a presumed natural affection to guide their action, 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190, the presumption that the state will protect a child's general welfare stems from a specific state statute. Ga. Code § 24A–101 (1978). Contrary to the suggestion of the dissent, however, we cannot assume that when the State of Georgia has custody of a child it acts so differently from a natural parent in seeking medical assistance for the child. No one has questioned the validity of the statutory presumption that the State acts in the child's best interest. Nor could such a challenge be mounted on the record before us. There is no evidence that the State, acting as guardian, attempted to admit any child for reasons unrelated to the child's need for treatment. Indeed, neither the District Court nor the appellees have suggested that wards of the State should receive any constitutional treatment different from children with natural parents.

Once we accept that the State's application for a child's admission to a hospital is made in good faith, then the question is whether the medical decisionmaking approach of the admitting physician is adequate to satisfy due process. We have already recognized that an independent medical judgment made from the perspective of the best interests of the child after a careful investigation is an acceptable means of justifying a voluntary commitment. We do not believe that the soundness of this decisionmaking is any the less reasonable in this setting.

Indeed, if anything, the decision with regard to wards of the State may well be even more reasonable in light of the

extensive written records that are compiled about each child while in the State's custody. In J. R.'s case, the admitting physician had a complete social and medical history of the child before even beginning the diagnosis. After carefully interviewing him and reviewing his extensive files, three physicians independently concluded that institutional care was in his best interests. See *supra*, at 590.

Since the state agency having custody and control of the child *in loco parentis* has a duty to consider the best interests of the child with respect to a decision on commitment to a mental hospital, the State may constitutionally allow that custodial agency to speak for the child, subject, of course, to the restrictions governing natural parents. On this record, we cannot declare unconstitutional Georgia's admission procedures for wards of the State.

(b) It is possible that the procedures required in reviewing a ward's need for continuing care should be different from those used to review the need of a child with natural parents. As we have suggested earlier, the issue of what process is due to justify continuing a voluntary commitment must be considered by the District Court on remand. In making that inquiry, the District Court might well consider whether wards of the State should be treated with respect to continuing therapy differently from children with natural parents.

The absence of an adult who cares deeply for a child has little effect on the reliability of the initial admission decision, but it may have some effect on how long a child will remain in the hospital. We noted in *Addington* v. *Texas*, 441 U. S., at 428–429, that "the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." For a child without natural parents, we must acknowledge the risk of being "lost in the shuffle." Moreover, there is at least some indication that J. R.'s commitment was prolonged because the Department of Family and Children Services had difficulty finding a foster

home for him. Whether wards of the State generally have received less protection than children with natural parents, and, if so, what should be done about it, however, are matters that must be decided in the first instance by the District Court on remand,[23] if the court concludes the issue is still alive.

V

It is important that we remember the purpose of Georgia's comprehensive mental health program. It seeks substantively and at great cost to provide care for those who cannot afford to obtain private treatment and procedurally to screen carefully all applicants to assure that institutional care is suited to the particular patient. The State resists the complex of procedures ordered by the District Court because in its view they are unnecessary to protect the child's rights, they divert public resources from the central objective of administering health care, they risk aggravating the tensions inherent in the family situation, and they erect barriers that may discourage parents from seeking medical aid for a disturbed child.

On this record, we are satisfied that Georgia's medical factfinding processes are reasonable and consistent with constitutional guarantees. Accordingly, it was error to hold unconstitutional the State's procedures for admitting a child for treatment to a state mental hospital. The judgment is

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[23] To remedy the constitutional violation, the District Court ordered hearings to be held for each member of the plaintiff class, see n. 2, *supra*. For 46 members of the class found to be treatable in "less drastic" settings, the District Court also ordered the State to expend such moneys as were necessary to provide alternative treatment facilities and programs. While the order is more appropriate as a remedy for a substantive due process violation, the court made no findings on that issue. The order apparently was intended to remedy the procedural due process violation it found. Since that judgment is reversed, there is no basis for us to consider the correctness of the remedy.

therefore reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring in the judgment.

For centuries it has been a canon of the common law that parents speak for their minor children.[1] So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it. *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters*, 268 U. S. 510.[2] In ironic contrast, the District Court in this case has said that the Constitution *requires* the State of Georgia to *disregard* this established principle. I cannot agree.

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[1] See 1 W. Blackstone, Commentaries *452–453; 2 J. Kent, Commentaries on American Law *203–206; J. Schouler, A Treatise on the Law of Domestic Relations 335–353 (3d ed. 1882); G. Field, The Legal Relations of Infants 63–80 (1888).

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U. S. 158, 166.

"The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin* v. *Yoder*, 406 U. S. 205, 232.

"Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 102 (STEVENS, J., concurring in part and dissenting in part).

Cf. *Stump* v. *Sparkman*, 435 U. S. 349, 366 (dissenting opinion).

[2] "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters*, 268 U. S., at 535.

There can be no doubt that commitment to a mental institution results in a "massive curtailment of liberty," *Humphrey* v. *Cady*, 405 U. S. 504, 509. In addition to the physical confinement involved, *O'Connor* v. *Donaldson*, 422 U. S. 563, a person's liberty is also substantially affected by the stigma attached to treatment in a mental hospital.[3] But not every loss of liberty is governmental deprivation of liberty, and it is only the latter that invokes the Due Process Clause of the Fourteenth Amendment.

The appellees were committed under the following section of the Georgia Code:

> "Authority to receive voluntary patients—
>
> "(a) The superintendent of any facility may receive for observation and diagnosis any individual 18 years of age, or older, making application therefor, any individual under 18 years of age for whom such application is made by his parent or guardian and any person legally adjudged to be incompetent for whom such application is made by his guardian. If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law." Ga. Code § 88–503.1 (1975).

Clearly, if the appellees in this case were adults who had voluntarily chosen to commit themselves to a state mental hospital, they could not claim that the State had thereby deprived them of liberty in violation of the Fourteenth Amendment. Just as clearly, I think, children on whose

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[3] The fact that such a stigma may be unjustified does not mean it does not exist. Nor does the fact that public reaction to past commitment may be less than the reaction to aberrant behavior detract from this assessment. The aberrant behavior may disappear, while the fact of past institutionalization lasts forever.

behalf their parents have invoked these voluntary procedures can make no such claim.

The Georgia statute recognizes the power of a party to act on behalf of another person under the voluntary commitment procedures in two situations: when the other person is a minor not over 17 years of age and the party is that person's parent or guardian, and when the other person has been "legally adjudged incompetent" and the party is that person's guardian. In both instances two conditions are present. First, the person being committed is presumptively incapable of making the voluntary commitment decision for himself. And second, the parent or guardian is presumed to be acting in that person's best interests.[4] In the case of guardians, these presumptions are grounded in statutes whose validity nobody has questioned in this case. Ga. Code § 49–201 (1978).[5] In the case of parents, the presumptions are grounded in a statutory embodiment of long-established principles of the common law.

Thus, the basic question in this case is whether the Constitution requires Georgia to ignore basic principles so long accepted by our society. For only if the State in this setting is constitutionally compelled always to intervene between parent and child can there be any question as to the constitutionally required extent of that intervention. I believe this basic question must be answered in the negative.[6]

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[4] This is also true of a child removed from the control of his parents. For the juvenile court then has a duty to "secure for him care as nearly as possible equivalent to that which [his parents] should have given him." Ga. Code § 24A–101 (1978).

[5] "The power of the guardian over the person of his or her ward shall be the same as that of the parent over his or her child, the guardian standing in his or her place; and in like manner it shall be the duty of the guardian to protect and maintain, and, according to the circumstances of the ward, to educate him or her."

[6] *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, was an entirely different case. The Court's opinion today discusses some of

Under our law, parents constantly make decisions for their minor children that deprive the children of liberty, and sometimes even of life itself. Yet surely the Fourteenth Amendment is not invoked when an informed parent decides upon major surgery for his child, even in a state hospital. I can perceive no basic constitutional differences between commitment to a mental hospital and other parental decisions that result in a child's loss of liberty.

I realize, of course, that a parent's decision to commit his child to a state mental institution results in a far greater loss of liberty than does his decision to have an appendectomy performed upon the child in a state hospital. But if, contrary to my belief, this factual difference rises to the level of a constitutional difference, then I believe that the objective checks upon the parents' commitment decision, embodied in Georgia law and thoroughly discussed, *ante*, at 613–617, are more than constitutionally sufficient.

To be sure, the presumption that a parent is acting in the best interests of his child must be a rebuttable one, since certainly not all parents are actuated by the unselfish motive the law presumes. Some parents are simply unfit parents. But Georgia clearly provides that an unfit parent can be stripped of his parental authority under laws dealing with neglect and abuse of children.[7]

This is not an easy case. Issues involving the family and issues concerning mental illness are among the most difficult that courts have to face, involving as they often do serious problems of policy disguised as questions of constitutional

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these differences, *ante*, at 604, but I think there is a more fundamental one. The *Danforth* case involved an expectant mother's right to decide upon an abortion—a personal substantive constitutional right. *Roe* v. *Wade*, 410 U. S. 113; *Doe* v. *Bolton*, 410 U. S. 179. By contrast, the appellees in this case had no substantive constitutional right not to be hospitalized for psychiatric treatment.

[7] See MR. JUSTICE BRENNAN'S opinion, *post*, at 630–631, and n. 16.

law. But when a state legislature makes a reasonable definition of the age of minority, and creates a rebuttable presumption that in invoking the statutory procedures for voluntary commitment a parent is acting in the best interests of his minor child, I cannot believe that the Fourteenth Amendment is violated. This is not to say that in this area the Constitution compels a State to respect the traditional authority of a parent, as in the *Meyer* and *Pierce* cases. I believe, as in *Prince* v. *Massachusetts*, 321 U. S. 158, that the Constitution would tolerate intervention by the State.[8] But that is a far cry from holding that such intervention is constitutionally compelled.

For these reasons I concur in the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, concurring in part and dissenting in part.

I agree with the Court that the commitment of juveniles to state mental hospitals by their parents or by state officials acting *in loco parentis* involves state action that impacts upon constitutionally protected interests and therefore must be accomplished through procedures consistent with the constitutional mandate of due process of law. I agree also that the District Court erred in interpreting the Due Process Clause to require preconfinement commitment hearings in all cases in which parents wish to hospitalize their children. I disagree, however, with the Court's decision to pretermit questions concerning the postadmission procedures due Georgia's institutionalized juveniles. While the question of the frequency of postadmission review hearings may properly be deferred, the

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[8] The *Prince* case held that the State may constitutionally intervene in the parent-child relationship for the purpose of enforcing its child-labor law.

If the State intervened, its procedures would, of course, be subject to the limitations imposed by the Fourteenth Amendment.

right to at least one postadmission hearing can and should be affirmed now. I also disagree with the Court's conclusion concerning the procedures due juvenile wards of the State of Georgia. I believe that the Georgia statute is unconstitutional in that it fails to accord preconfinement hearings to juvenile wards of the State committed by the State acting *in loco parentis*.

I

RIGHTS OF CHILDREN COMMITTED TO MENTAL INSTITUTIONS

Commitment to a mental institution necessarily entails a "massive curtailment of liberty," *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972), and inevitably affects "fundamental rights." *Baxstrom* v. *Herald*, 383 U. S. 107, 113 (1966). Persons incarcerated in mental hospitals are not only deprived of their physical liberty, they are also deprived of friends, family, and community. Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers. They are subject to intrusive treatment which, especially if unwarranted, may violate their right to bodily integrity. Such treatment modalities may include forced administration of psychotropic medication,[1] aversive conditioning,[2] convulsive therapy,[3] and even psychosurgery.[4] Furthermore, as the Court recognizes, see *ante*, at 600, persons confined in mental institutions are stigmatized as

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[1] See *Winters* v. *Miller*, 446 F. 2d 65 (CA2), cert. denied, 404 U. S. 985 (1971); *Scott* v. *Plante*, 532 F. 2d 939 (CA3 1976); *Souder* v. *McGuire*, 423 F. Supp. 830 (MD Pa. 1976).

[2] See *Knecht* v. *Gillman*, 488 F. 2d 1136 (CA8 1973); *Mackey* v. *Procunier*, 477 F. 2d 877 (CA9 1973).

[3] See *Wyatt* v. *Hardin*, No. 3195–N (MD Ala., Feb. 28, June 26, and July 1, 1975); *Price* v. *Sheppard*, 307 Minn. 250, 239 N. W. 2d 905 (1976); *Nelson* v. *Hudspeth*, C. A. No. J75–40 (R) (SD Miss., May 16, 1977).

[4] See *Kaimowitz* v. *Michigan Dept. of Mental Health*, 42 U. S. L. W. 2063 (Cir. Ct. Wayne Cty., Mich., 1973).

sick and abnormal during confinement and, in some cases, even after release.[5]

Because of these considerations, our cases have made clear that commitment to a mental hospital "is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor* v. *Donaldson*, 422 U. S. 563, 580 (1975) (BURGER, C. J., concurring). See, *e. g.*, *McNeil* v. *Director, Patuxent Institution*, 407 U. S. 245 (1972) (defective delinquent commitment following expiration of prison term); *Specht* v. *Patterson*, 386 U. S. 605 (1967) (sex offender commitment following criminal conviction); *Chaloner* v. *Sherman*, 242 U. S. 455, 461 (1917) (incompetence inquiry). In the absence of a voluntary, knowing, and intelligent waiver, adults facing commitment to mental institutions are entitled to full and fair adversary hearings in which the necessity for their commitment is established to the satisfaction of a neutral tribunal. At such hearings they must be accorded the right to "be present with counsel, have an opportunity to be heard, be confronted with witnesses against [them], have the right to cross-examine, and to offer evidence of [their] own." *Specht* v. *Patterson*, *supra*, at 610.

These principles also govern the commitment of children. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, *e. g.*, *Breed* v. *Jones*, 421 U. S. 519 (1975); *Goss* v. *Lopez*, 419 U. S. 565 (1975); *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *In re Gault*, 387 U. S. 1 (1967)." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 74 (1976).

Indeed, it may well be argued that children are entitled to more protection than are adults. The consequences of an erroneous commitment decision are more tragic where chil-

[5] See generally Note, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1200 (1974).

dren are involved. Children, on the average, are confined for longer periods than are adults.[6] Moreover, childhood is a particularly vulnerable time of life [7] and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives.[8] Furthermore, the provision of satisfactory institutionalized mental care for children generally requires a substantial financial commitment [9] that too often has not been forthcoming.[10] Decisions of the lower courts have chronicled the inadequacies of existing mental health facilities for children. See, *e. g., New York State Assn. for Retarded Children* v. *Rockefeller,* 357 F. Supp. 752, 756 (EDNY 1973) (conditions at Willowbrook School for the Mentally Retarded are "inhumane," involving "failure to protect the physical safety of [the] children," substantial personnel shortage, and "poor" and "hazardous" conditions); *Wyatt* v. *Stickney,* 344 F. Supp. 387, 391 (MD Ala. 1972), aff'd *sub nom. Wyatt* v. *Aderholt,* 503 F. 2d 1305 (CA5 1974) ("grossly substandard" conditions at Partlow School for the Mentally Retarded lead to "hazardous and deplorable inadequacies in the institution's operation").[11]

In addition, the chances of an erroneous commitment

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[6] See Dept. of HEW, National Institute of Mental Health, Biometry Branch, Statistical Note 90, Utilization of Psychiatric Facilities by Persons 18 Years of Age, Table 8, p. 14 (July 1973).

[7] See J. Bowlby, Child Care and the Growth of Love 80 (1953); J. Horrocks, The Psychology of Adolescence 156 (1976); F. Elkin, Agents of Socialization in Children's Behavior 357, 360 (R. Bergman ed. 1968).

[8] See B. Flint, The Child and the Institution 14–15 (1966); H. Leland & D. Smith, Mental Retardation: Present and Future Perspectives 86 (1974); N. Hobbs, The Futures of Children 142–143 (1975).

[9] See Joint Commission on Mental Health of Children, Crisis in Child Mental Health: Challenge for the 1970's, p. 271 (1969).

[10] See R. Kugel & W. Wolfensberger, Changing Patterns in Residential Services for the Mentally Retarded 22 (1969).

[11] See also *Wheeler* v. *Glass,* 473 F. 2d 983 (CA7 1973); *Davis* v. *Watkins,* 384 F. Supp. 1196 (ND Ohio 1974); *Welsch* v. *Likins,* 373 F. Supp. 487 (Minn. 1974).

decision are particularly great where children are involved. Even under the best of circumstances psychiatric diagnosis and therapy decisions are fraught with uncertainties. See *O'Connor* v. *Donaldson, supra,* at 584 (BURGER, C. J., concurring). These uncertainties are aggravated when, as under the Georgia practice, the psychiatrist interviews the child during a period of abnormal stress in connection with the commitment, and without adequate time or opportunity to become acquainted with the patient.[12] These uncertainties may be further aggravated when economic and social class separate doctor and child, thereby frustrating the accurate diagnosis of pathology.[13]

These compounded uncertainties often lead to erroneous commitments since psychiatrists tend to err on the side of medical caution and therefore hospitalize patients for whom other dispositions would be more beneficial.[14] The National Institute of Mental Health recently found that only 36% of patients below age 20 who were confined at St. Elizabeths Hospital actually required such hospitalization.[15] Of particular relevance to this case, a Georgia study Commission on Mental Health Services for Children and Youth concluded that more than half of the State's institutionalized children were not in need of confinement if other forms of care were made available or used. Cited in *J. L.* v. *Parham,* 412 F. Supp. 112, 122 (MD Ga. 1976).

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[12] See J. Simmons, Psychiatric Examination of Children 1, 6 (1974); Lourie & Rieger, Psychiatric and Psychological Examination of Children, in 2 American Handbook of Psychiatry 19 (2d ed. 1974).

[13] See Joint Commission on Mental Health of Children, *supra* n. 9, at 267.

[14] See T. Scheff, Being Mentally Ill: A Sociological Theory (1966); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693 (1974).

[15] See Dept. of HEW, National Institute of Mental Health, Biometry Branch, Statistical Note 115, Children and State Mental Hospitals 4 (Apr. 1975).

II

RIGHTS OF CHILDREN COMMITTED BY THEIR PARENTS

A

Notwithstanding all this, Georgia denies hearings to juveniles institutionalized at the behest of their parents. Georgia rationalizes this practice on the theory that parents act in their children's best interests and therefore may waive their children's due process rights. Children incarcerated because their parents wish them confined, Georgia contends, are really voluntary patients. I cannot accept this argument.

In our society, parental rights are limited by the legitimate rights and interests of their children. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Prince* v. *Massachusetts*, 321 U. S. 158, 170 (1944). This principle is reflected in the variety of statutes and cases that authorize state intervention on behalf of neglected or abused children [16] and that, *inter alia*, curtail parental authority to alienate their children's property,[17] to withhold necessary medical treatment,[18] and to deny children exposure to ideas

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[16] See generally S. Katz, When Parents Fail (1971); M. Midonick & D. Besharov, Children, Parents and the Courts: Juvenile Delinquency, Ungovernability, and Neglect (1972); Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975).

[17] See, *e. g.*, *Martorell* v. *Ochoa*, 276 F. 99 (CA1 1921).

[18] See, *e. g.*, *Jehovah's Witnesses* v. *King County Hospital*, 278 F. Supp. 488 (WD Wash. 1967), aff'd, 390 U. S. 598 (1968); *In re Sampson*, 65 Misc. 2d 658, 317 N. Y. S. 2d 641 (Fam. Ct. Ulster County, 1970), aff'd, 37 App. Div. 2d 668, 323 N. Y. S. 2d 253 (1971), aff'd, 29 N. Y. 2d 900, 278 N. E. 2d 918 (1972); *State* v. *Perricone*, 37 N. J. 463, 181 A. 2d 751 (1962). Similarly, more recent legal disputes involving the sterilization of children have led to the conclusion that parents are not permitted to authorize operations with such far-reaching consequences. See, *e. g.*, *A. L.* v.

and experiences they may later need as independent and autonomous adults.[19]

This principle is also reflected in constitutional jurisprudence. Notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children. States, for example, may not condition a minor's right to secure an abortion on attaining her parents' consent since the right to an abortion is an important personal right and since disputes between parents and children on this question would fracture family autonomy. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 75.

This case is governed by the rule of *Danforth*. The right to be free from wrongful incarceration, physical intrusion, and stigmatization has significance for the individual surely as great as the right to an abortion. Moreover, as in *Danforth*, the parent-child dispute at issue here cannot be characterized as involving only a routine child-rearing decision made within the context of an ongoing family relationship. Indeed, *Danforth* involved only a potential dispute between parent and child, whereas here a break in family autonomy has actually resulted in the parents' decision to surrender custody of their child to a state mental institution. In my view, a child who has been ousted from his family has even greater need for an independent advocate.

Additional considerations counsel against allowing parents unfettered power to institutionalize their children without

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G. R. H., 163 Ind. App. 636, 325 N. E. 2d 501 (1975); *In re M. K. R.*, 515 S. W. 2d 467 (Mo. 1974); *Frazier* v. *Levi*, 440 S. W. 2d 393 (Tex. Civ. App. 1969).

[19] See *Commonwealth* v. *Renfrew*, 332 Mass. 492, 126 N. E. 2d 109 (1955); *Meyerkorth* v. *State*, 173 Neb. 889, 115 N. W. 2d 585 (1962), appeal dism'd, 372 U. S. 705 (1963); *In re Weberman*, 198 Misc. 1055, 100 N. Y. S. 2d 60 (Sup. Ct. 1950), aff'd, 278 App. Div. 656, 102 N. Y. S. 2d 418, aff'd, 302 N. Y. 855, 100 N. E. 2d 47, appeal dism'd, 342 U. S. 884 (1951).

cause or without any hearing to ascertain that cause. The presumption that parents act in their children's best interests, while applicable to most child-rearing decisions, is not applicable in the commitment context. Numerous studies reveal that parental decisions to institutionalize their children often are the results of dislocation in the family unrelated to the children's mental condition.[20] Moreover, even well-meaning parents lack the expertise necessary to evaluate the relative advantages and disadvantages of inpatient as opposed to outpatient psychiatric treatment. Parental decisions to waive hearings in which such questions could be explored, therefore, cannot be conclusively deemed either informed or intelligent. In these circumstances, I respectfully suggest, it ignores reality to assume blindly that parents act in their children's best interests when making commitment decisions and when waiving their children's due process rights.

B

This does not mean States are obliged to treat children who are committed at the behest of their parents in precisely the same manner as other persons who are involuntarily committed. The demands of due process are flexible and the parental commitment decision carries with it practical implications that States may legitimately take into account. While as a general rule due process requires that commitment hearings precede involuntary hospitalization, when parents seek to hospitalize their children special considerations militate in favor of postponement of formal commitment proceedings and against mandatory adversary preconfinement commitment hearings.

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[20] Murdock, Civil Rights of the Mentally Retarded: Some Critical Issues, 48 Notre Dame Law. 133, 138 (1972); Vogel & Bell, The Emotionally Disturbed Child as the Family Scapegoat, in a Modern Introduction to the Family 412 (1968).

First, the prospect of an adversary hearing prior to admission might deter parents from seeking needed medical attention for their children. Second, the hearings themselves might delay treatment of children whose home life has become impossible and who require some form of immediate state care. Furthermore, because adversary hearings at this juncture would necessarily involve direct challenges to parental authority, judgment, or veracity, preadmission hearings may well result in pitting the child and his advocate against the parents. This, in turn, might traumatize both parent and child and make the child's eventual return to his family more difficult.

Because of these special considerations, I believe that States may legitimately postpone formal commitment proceedings when parents seek inpatient psychiatric treatment for their children. Such children may be admitted, for a limited period, without prior hearing, so long as the admitting psychiatrist first interviews parent and child and concludes that short-term inpatient treatment would be appropriate.

Georgia's present admission procedures are reasonably consistent with these principles. See *ante*, at 613–616. To the extent the District Court invalidated this aspect of the Georgia juvenile commitment scheme and mandated preconfinement hearings in all cases, I agree with the Court that the District Court was in error.

C

I do not believe, however, that the present Georgia juvenile commitment scheme is constitutional in its entirety. Although Georgia may postpone formal commitment hearings, when parents seek to commit their children, the State cannot dispense with such hearings altogether. Our cases make clear that, when protected interests are at stake, the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*

v. *Eldridge*, 424 U. S. 319, 333 (1976), quoting in part from *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). Whenever prior hearings are impracticable, States must provide reasonably prompt postdeprivation hearings. Compare *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), with *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974).

The informal postadmission procedures that Georgia now follows are simply not enough to qualify as hearings—let alone reasonably prompt hearings. The procedures lack all the traditional due process safeguards. Commitment decisions are made *ex parte*. Georgia's institutionalized juveniles are not informed of the reasons for their commitment; nor do they enjoy the right to be present at the commitment determination, the right to representation, the right to be heard, the right to be confronted with adverse witnesses, the right to cross-examine, or the right to offer evidence of their own. By any standard of due process, these procedures are deficient. See *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972); *McNeil* v. *Director, Patuxent Institution*, 407 U. S. 245 (1972); *Specht* v. *Patterson*, 386 U. S., at 610. See also *Goldberg* v. *Kelly*, 397 U. S. 254, 269–271 (1970). I cannot understand why the Court pretermits condemnation of these *ex parte* procedures which operate to deny Georgia's institutionalized juveniles even "some form of hearing," *Mathews* v. *Eldridge*, *supra*, at 333, before they are condemned to suffer the rigors of long-term institutional confinement.[21]

The special considerations that militate against preadmis-

[21] The National Institute of Mental Health has reported: "[T]housands upon thousands of elderly patients now confined on the back wards of . . . state [mental] institutions were first admitted as children thirty, forty, and even fifty years ago. A recent report from one state estimates that one in every four children admitted to its mental hospitals 'can anticipate being permanently hospitalized for the next 50 years of their lives.'" Joint Commission on Mental Health of Children, *supra* n. 9, at 5–6.

sion commitment hearings when parents seek to hospitalize their children do not militate against reasonably prompt postadmission commitment hearings. In the first place, postadmission hearings would not delay the commencement of needed treatment. Children could be cared for by the State pending the disposition decision.

Second, the interest in avoiding family discord would be less significant at this stage since the family autonomy already will have been fractured by the institutionalization of the child. In any event, postadmission hearings are unlikely to disrupt family relationships. At later hearings, the case for and against commitment would be based upon the observations of the hospital staff and the judgments of the staff psychiatrists, rather than upon parental observations and recommendations. The doctors urging commitment, and not the parents, would stand as the child's adversaries. As a consequence, postadmission commitment hearings are unlikely to involve direct challenges to parental authority, judgment, or veracity. To defend the child, the child's advocate need not dispute the parents' original decision to seek medical treatment for their child, or even, for that matter, their observations concerning the child's behavior. The advocate need only argue, for example, that the child had sufficiently improved during his hospital stay to warrant outpatient treatment or outright discharge. Conflict between doctor and advocate on this question is unlikely to lead to family discord.

As a consequence, the prospect of a postadmission hearing is unlikely to deter parents from seeking medical attention for their children and the hearing itself is unlikely so to traumatize parent and child as to make the child's eventual return to the family impracticable.

Nor would postadmission hearings defeat the primary purpose of the state juvenile mental health enterprise. Under the present juvenile commitment scheme, Georgia parents do not enjoy absolute discretion to commit their

children to public mental hospitals. See *ante*, at 614–615. Superintendents of state facilities may not accept children for long-term treatment unless they first determine that the children are mentally ill and will likely benefit from long-term hospital care. See *ibid.* If the superintendent determines either condition is unmet, the child must be released or refused admission, regardless of the parents' desires. See *ibid.* No legitimate state interest would suffer if the superintendent's determinations were reached through fair proceedings with due consideration of fairly presented opposing viewpoints rather than through the present practice of secret, *ex parte* deliberations.[22]

Nor can the good faith and good intentions of Georgia's psychiatrists and social workers, adverted to by the Court, see *ante*, at 615–616, excuse Georgia's *ex parte* procedures. Georgia's admitting psychiatrists, like the school disciplinarians described in *Goss* v. *Lopez*, 419 U. S. 565 (1975), "although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed." *Id.*, at 580. See App. 188–190, testimony of Dr. Messinger. Here, as in *Goss*, the "risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the . . . process. . . . '[F]airness can rarely be obtained by secret, one-sided determination

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[22] Indeed, postadmission hearings may well advance the purposes of the state enterprise. First, hearings will promote accuracy and ensure that the superintendent diverts children who do not require hospitalization to more appropriate programs. Second, the hearings themselves may prove therapeutic. Children who feel that they have received a fair hearing may be more likely to accept the legitimacy of their confinement, acknowledge their illness, and cooperate with those attempting to give treatment. This, in turn, would remove a significant impediment to successful therapy. See Katz, The Right to Treatment—An Enchanting Legal Fiction?, 36 U. Chi. L. Rev. 755, 768–769 (1969); *O'Connor* v. *Donaldson*, 422 U. S. 563, 579 (1975) (BURGER, C. J., concurring).

of facts decisive of rights. . . .' 'Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *Goss* v. *Lopez, supra,* at 580, quoting in part from *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 170, 171–172 (1951) (Frankfurter, J., concurring).

III

RIGHTS OF CHILDREN COMMITTED BY THEIR STATE GUARDIANS

Georgia does not accord prior hearings to juvenile wards of the State of Georgia committed by state social workers acting *in loco parentis.* The Court dismisses a challenge to this practice on the grounds that state social workers are obliged by statute to act in the children's best interest. See *ante,* at 619.

I find this reasoning particularly unpersuasive. With equal logic, it could be argued that criminal trials are unnecessary since prosecutors are not supposed to prosecute innocent persons.

To my mind, there is no justification for denying children committed by their social workers the prior hearings that the Constitution typically requires. In the first place, such children cannot be said to have waived their rights to a prior hearing simply because their social workers wished them to be confined. The rule that parents speak for their children, even if it were applicable in the commitment context, cannot be transmuted into a rule that state social workers speak for their minor clients. The rule in favor of deference to parental authority is designed to shield parental control of child rearing from state interference. See *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925). The rule cannot be invoked in defense of unfettered state control of child rearing or to immunize from review the decisions of state social work-

ers. The social worker-child relationship is not deserving of the special protection and deference accorded to the parent-child relationship, and state officials acting *in loco parentis* cannot be equated with parents. See *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972).

Second, the special considerations that justify postponement of formal commitment proceedings whenever parents seek to hospitalize their children are absent when the children are wards of the State and are being committed upon the recommendations of their social workers. The prospect of preadmission hearings is not likely to deter state social workers from discharging their duties and securing psychiatric attention for their disturbed clients. Moreover, since the children will already be in some form of state custody as wards of the State, prehospitalization hearings will not prevent needy children from receiving state care during the pendency of the commitment proceedings. Finally, hearings in which the decisions of state social workers are reviewed by other state officials are not likely to traumatize the children or to hinder their eventual recovery.

For these reasons, I believe that, in the absence of exigent circumstances, juveniles committed upon the recommendation of their social workers are entitled to preadmission commitment hearings. As a consequence, I would hold Georgia's present practice of denying these juveniles prior hearings unconstitutional.

IV

Children incarcerated in public mental institutions are constitutionally entitled to a fair opportunity to contest the legitimacy of their confinement. They are entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful commitment. Georgia should not be permitted to deny that opportunity and that champion simply because the children's parents or guardians wish them

to be confined without a hearing. The risk of erroneous commitment is simply too great unless there is some form of adversary review. And fairness demands that children abandoned by their supposed protectors to the rigors of institutional confinement be given the help of some separate voice.

SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA ET AL. *v.* INSTITUTIONALIZED JUVENILES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 77-1715. Argued October 10, 1978—Decided June 20, 1979

Appellees filed a class action in Federal District Court against the Pennsylvania Secretary of Public Welfare and the directors of three state mental health facilities, seeking declaratory and injunctive relief and contending that Pennsylvania's procedures for the voluntary admission of mentally ill and mentally retarded children to a state hospital violated the Due Process Clause of the Fourteenth Amendment. Holding that the State's procedures were insufficient to satisfy the Due Process Clause and that only a formal adversary hearing could suffice to protect children in appellees' class from being needlessly confined in mental hospitals, the District Court concluded that specified procedures were required before any child could be admitted voluntarily to a mental hospital.

Held:

1. The risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a "neutral factfinder" to determine whether the statutory requirements for admission are satisfied. That inquiry must carefully probe the child's background and must also include an interview with the child. It is also necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, the child's continuing need for commitment must be reviewed periodically. *Parham* v. *J. R.*, *ante*, p. 584, controlling. P. 646.

2. Pennsylvania's procedures comply with these due process requirements. No child is admitted without at least one and often more psychiatric examinations by an independent team of mental health professionals whose sole concern is whether the child needs and can benefit from institutional care. The treatment team interviews the child and parents and compiles a full background history. If the treatment team concludes that institutional care is not in the child's best interest, it must refuse the child's admission; every child's condition is reviewed at least every 30 days. Pp. 646–650.

459 F. Supp. 30, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a statement concurring in the judgment, *post*, p. 650. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 650.

Norman J. Watkins, Deputy Attorney General of Pennsylvania, argued the cause for appellants. With him on the briefs were *Robert B. Hoffman,* Deputy Attorney General, and *Gerald Gornish,* Acting Attorney General.

David Ferleger argued the cause and filed a brief for appellees.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal raises issues similar to those decided in *Parham* v. *J. R., ante,* p. 584, as to what process is due when the parents or guardian of a child seek state institutional mental health care.

I

This is the second time we have reviewed a District Court's judgment that Pennsylvania's procedures for the voluntary admission of mentally ill and mentally retarded children to a state hospital are unconstitutional. In the earlier suit, five children who were between the ages of 15 and 18 challenged the 1966 statute pursuant to which they had been admitted to Haverford State Hospital. Pa. Stat. Ann., Tit. 50, §§ 4402, 4403 (Purdon 1969). After a three-judge District Court, with one judge dissenting, declared the statute unconstitutional, *Bartley* v. *Kremens,* 402 F. Supp. 1039 (ED Pa. 1975), the Pennsylvania Legislature amended its mental health code with regard to the mentally ill. The amendments placed

*Briefs of *amici curiae* urging affirmance were filed by *S. Shepherd Tate, John H. Lashly, Russell E. Webb,* and *Joseph F. Vargyas* for the American Bar Association; and by *Ronald M. Soskin* for the National Center for Law and the Handicapped et al.

adolescents over the age of 14 in essentially the same position as adults for purposes of a voluntary admission. Mental Health Procedures Act of 1976, § 201, Pa. Stat. Ann., Tit. 50, § 7201 (Purdon Supp. 1978). Under the new statute, the named plaintiffs could obtain their requested releases from the state hospitals independently of the constitutionality of the 1966 statute, and we therefore held that the claims of the named plaintiffs were moot. *Kremens* v. *Bartley*, 431 U. S. 119, 129 (1977). We then remanded the case to the District Court for "reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims." *Id.*, at 135.

On remand, 12 new plaintiffs, appellees here, were named to represent classes of mentally ill and mentally retarded children. Nine of the children were younger than 14 and constituted all of those who had been admitted to the State's hospitals for the mentally ill in accordance with the 1976 Act at the time the suit was brought; three other children represented a class of patients who were 18 and younger and who had been or would be admitted to a state hospital for the mentally retarded under the 1966 Act and 1973 regulations implementing that Act. All 12 children had been admitted on the application of parents or someone standing *in loco parentis* with state approval after an independent medical examination.

The suit was filed against several named defendants, the Pennsylvania Secretary of Public Welfare and the directors of three state owned and operated facilities. The District Court, however, certified a defendant class that consisted of " 'directors of all mental health and mental retardation facilities in Pennsylvania which are subject to regulation by the defendant Secretary of Public Welfare.' " 459 F. Supp. 30, 40 n. 37 (ED Pa. 1978).[1]

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[1] Appellants argue that the State's regulation of admission to private hospitals is insufficient to constitute state action for purposes of the Due Process Clause of the Fourteenth Amendment. They, however, did not

Representatives of the nine mentally ill children sought a declaration that the admission procedures embodied in § 201 [2] of the Pennsylvania Mental Health Procedures Act of 1976, Pa. Stat. Ann., Tit. 50, § 7201 (Purdon Supp. 1978), which subsequently have been expanded by regulations promulgated by the Secretary of Public Welfare, 8 Pa. Bull. 2432 et seq. (1978), violated their procedural due process rights and requested the court to issue an injunction against the statute's future enforcement. The three mentally retarded children presented the same claims as to §§ 402 [3] and 403 [4] of the

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contest the District Court's definition of the defendant class, which included directors of both public and private facilities. In light of our holding that Pennsylvania's procedures comport with due process, we do not decide whether the District Court correctly found state action.

[2] Section 201 provides in part: "A parent, guardian, or person standing in loco parentis to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child."

[3] Section 402 provides:

"(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

. . . . .

"(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

"(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted."

[4] Section 403 provides:

"(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

. . . . .

"(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

"(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days."

Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, §§ 4402 and 4403 (Purdon 1969), and the regulations promulgated thereunder.[5]

The District Court certified two subclasses of plaintiffs[6]

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[5] The 1973 regulations provide in part:

"1. . . . [M]entally retarded juveniles may be referred by either a pediatrician, or general physician or psychologist;

"2. This referral must be accomplished by a psychiatric evaluation and that report must indicate with specificity the reasons that the person requires institutional care; however, a medical or psychological evaluation may accompany the referral of a mentally retarded juvenile;

"3. The Director of the Institution . . . shall have conducted an *independent* examination of the proposed juvenile, and if his results disagree with the professional's opinion, the Director . . . shall discharge the juvenile;

. . . . .

"5. Within 24 hours after the juvenile's admission, every youth who is at least 13 years of age must receive written notification (which he signs) explaining his rights indicating that he will be given a status report periodically of his condition; that he can contact by telephone or by mail his parents or the person who requested his admission; and that he will be furnished with the number of counsel . . . that he can call for representation . . . ;

"6. In the event that a juvenile whose chronological age is 13 or older objects (either orally or in writing) to remaining in the Institution, the Director . . . *if he feels it is necessary for the youth to remain*, may continue the institutionalization for two business days during which time he shall notify the applicant and the referral unit so that either party may institute a 460 [involuntary commitment] proceeding. . . ." 3 Pa. Bull. 1840 (1973).

[6] One subclass consisted of "all juveniles under the age of fourteen who are subject to inpatient treatment under Article II of the 1976 Act." 459 F. Supp., at 41. The other subclass was "mentally retarded juveniles age eighteen or younger." *Id.*, at 42. Appellants argue that the District Court failed to heed our admonition in remanding this case previously that it should " 'stop, look, and listen' before certifying a class in order to adjudicate constitutional claims." *Kremens* v. *Bartley*, 431 U. S. 119, 135 (1977). Given our disposition of the merits of this appeal, we need not decide whether these subclasses satisfy the requirements of Fed. Rule Civ. Proc. 23.

under Fed. Rule Civ. Proc. 23 and held that the statutes challenged by each subclass were unconstitutional. It held that the State's procedures were insufficient to satisfy the Due Process Clause of the Fourteenth Amendment.

The District Court's analysis in this case was similar to that used by the District Court in *J. L.* v. *Parham*, 412 F. Supp. 112 (MD Ga. 1976), reversed and remanded *sub nom. Parham* v. *J. R.*, *ante*, p. 584. The court in this case concluded that these children had a constitutionally protected liberty interest that could not be "waived" by their parents. This conclusion, coupled with the perceived fallibility of psychiatric diagnosis, led the court to hold that only a formal adversary hearing could suffice to protect the children in appellees' class from being needlessly confined in mental hospitals.

To further protect the children's interests, the court concluded that the following procedures were required before any child could be admitted voluntarily to a mental hospital:

1) 48-hour notice prior to any hearing;

2) legal counsel "during all significant stages of the commitment process";

3) the child's presence at all commitment hearings;

4) a finding by an impartial tribunal based on clear and convincing evidence that the child required institutional treatment;

5) a probable-cause determination within 72 hours after admission to a hospital;

6) a full hearing, including the right to confront and cross-examine witnesses, within two weeks from the date of the initial admission. App. 1097a–1098a.[7]

Appellants, all of the defendants before the District Court, appealed the judgment. We noted probable jurisdiction, and

[7] Judge Broderick dissented from the judgment of the majority. In his view, the majority "has prescribed 'an overdose' of due process." 459 F. Supp., at 53.

consolidated the case with *Parham* v. *J. R.*, *ante*, p. 584. 437 U. S. 902.

II

(a) Much of what we said in *Parham* v. *J. R.* applies with equal force to this case. The liberty rights and interests of the appellee children, the prerogatives, responsibilities, and interests of the parents, and the obligations and interests of the State are the same. Our holding as to what process is due in *Parham* controls here, particularly:

> "We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied. . . . That inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure." *Parham* v. *J. R.*, *ante*, at 606–607.

The only issue is whether Pennsylvania's procedures for the voluntary commitment of children comply with these requirements.

(b) Unlike in *Parham* v. *J. R.*, where the statute being challenged was general and thus the procedures for admission were evaluated hospital by hospital, the statute and regulations in Pennsylvania are specific. Our focus here is on the codified procedures declared unconstitutional by the District Court.

The Mental Health Procedures Act of 1976 and regulations promulgated by the Secretary describe the procedures for the

voluntary admission for inpatient treatment of mentally ill children. Section 201 of the Act provides that "a parent, guardian, or person standing in loco parentis to a child less than 14 years of age" may apply for a voluntary examination and treatment for the child. After the child receives an examination and is provided with temporary treatment, the hospital must formulate "an individualized treatment plan . . . by a treatment team." Within 72 hours the treatment team is required to determine whether inpatient treatment is "necessary" and why. Pa. Stat. Ann., Tit. 50, § 7205 (Purdon Supp. 1978). The hospital must inform the child and his parents both of the necessity for institutional treatment and of the nature of the proposed treatment. *Ibid.*

Regulations promulgated under the 1976 Act provide that each child shall be re-examined and his or her treatment plan reviewed not less than once every 30 days. See § 7100.108 (a), 8 Pa. Bull. 2436 (1978). The regulations also permit a child to object to the treatment plan and thereby obtain a review by a mental health professional independent of the treatment team. The findings of this person are reported directly to the director of the hospital who has the power and the obligation to release any child who no longer needs institutional treatment.

The statute indeed provides three methods for release of a child under the age of 14 from a mental hospital. First, the child's parents or guardian may effect his release at will. Pa. Stat. Ann., Tit. 50, § 7206 (b) (Purdon Supp. 1978). Second, "any responsible party" may petition the juvenile court if the person believes that treatment in a less restrictive setting would be in the best interests of the child. *Ibid.* If such a petition is filed, an attorney is appointed to represent the child's interests and a hearing is held within 10 days to determine "what inpatient treatment, if any, is in the minor's best interest." *Ibid.* Finally, the director of the hospital may release any child whenever institutional treatment is no longer medically indicated. § 7206 (c).

The Mental Health and Mental Retardation Act of 1966 regulates the voluntary admission for inpatient hospital habilitation of the mentally retarded. The admission process has been expanded significantly by regulations promulgated in 1973 by Pennsylvania's Secretary of Public Welfare. 3 Pa. Bull. 1840 (1973). Unlike the procedure for the mentally ill, a hospital is not permitted to admit a mentally retarded child based solely on the application of a parent or guardian. All children must be referred by a physician and each referral must be accompanied by a medical or psychological evalution. In addition, the director of the institution must make an independent examination of each child, and if he disagrees with the recommendation of the referring physician as to whether hospital care is "required," the child must be discharged. Mentally retarded children or anyone acting on their behalf may petition for a writ of habeas corpus to challenge the sufficiency or legality of the "proceedings leading to commitment." Pa. Stat. Ann., Tit. 50, § 4426 (Purdon 1969).

Any child older than 13 who is admitted to a hospital must have his rights explained to him and must be informed that a status report on his condition will be provided periodically. The older child is also permitted to object, either orally or in writing, to his hospitalization. After such objection, the director of the facility, if he feels that hospitalization is still necessary, must institute an involuntary commitment proceeding under § 406 of the Act, Pa. Stat. Ann., Tit. 50, § 4406 (Purdon 1969).

What the statute and regulations do not make clear is how the hospital staff decides that inpatient care is required for a child. The director of Haverford State Hospital for the mentally ill was the sole witness called by either side to testify about the decisionmaking process at a state hospital. She described the process as follows:

> "[T]here is an initial examination made by the psychiatrist, and is so designated as an admission note on the

> hospital record. Subsequently, for all adolescents on the Adolescent Service at Haverford State Hospital, there are routine studies done, such as an electroencephalogram, a neurological examination, a medical examination, and a complete battery of psychological tests and school evaluation, as well as a psychiatric evaluation. When all their data has been compiled, an entire staff conference is held, which is called a new case conference, at which point the complete case is re-examined and it is decided whether or not the child needs hospitalization, and at that same time, as well, an adequate treatment course is planned." App. 112a.

In addition to the physical and mental examinations that are conducted for each child within the institutions, the staff compiles a substantial "pre-admission background information" file on each child.[8] After the child is admitted, there is a periodic review of the child's condition by the staff. His status is reviewed by a different social worker at least every 30 days. Since the State places a great deal of emphasis on family therapy, the parents or guardians are met with weekly to discuss the child's case. *Id.*, at 113a.

We are satisfied that these procedures comport with the due process requirements set out earlier. No child is admitted without at least one and often more psychiatric examinations by an independent team of mental health professionals whose

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[8] Appellees argue that not much weight should be accorded to these files because the record does not make clear whether they were used in making the admission decision. The District Court, however, found that "virtually all of the information was received by the admitting facilities prior to admission." 459 F. Supp., at 36 n. 15. The court did acknowledge that it was not clear to what extent the information was used, but nonetheless admitted all of the records into evidence. Since it was available, we, like the District Court, assume the information served as a factual basis for some portions of the diagnoses of the children at the time of their admission to the hospitals.

sole concern under the statute is whether the child needs and can benefit from institutional care. The treatment team not only interviews the child and parents but also compiles a full background history from all available sources. If the treatment team concludes that institutional care is not in the child's best interest, it must refuse the child's admission. Finally, every child's condition is reviewed at least every 30 days. This program meets the criteria of our holding in *Parham*.[9] Accordingly, the judgment of the District Court that Pennsylvania's statutes and regulations are unconstitutional is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

For the reasons stated in his opinion concurring in the judgment in *Parham* v. *J. R.*, *ante*, p. 621, MR. JUSTICE STEWART concurs in the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, concurring in part and dissenting in part.

For the reasons stated in my opinion in *Parham* v. *J. R.*, *ante*, p. 625 (concurring in part and dissenting in part), I

[9] Although the District Court briefly described the situation of each of the children in appellees' class, it did not indicate the process for each of their admissions. We cannot determine on the record before us whether each child's admission conformed to our due process standards. Just as in *Parham*, individual members of appellees' class are free to argue on remand that their particular commitments violated those standards.

Also, we note that as in *Parham* we are faced only with the issue of what process is due at the initial admission, and thus we are not deciding what postadmission procedures are constitutionally adequate to continue a voluntary commitment. The District Court had no reason to consider that issue, and indeed from our reading of appellees' complaint there does not appear to be any specific challenge to the State's review procedures. However, we leave it to the District Court on remand to determine what further proceedings are necessary.

agree with the Court that Pennsylvania's preadmission psychiatric interview procedures pass constitutional muster. I cannot agree, however, with the Court's decision to pretermit questions concerning Pennsylvania's postadmission procedures. See *ante,* at 650 n. 9. In my view, these procedures should be condemned now.

Pennsylvania provides neither representation nor reasonably prompt postadmission hearings to mentally retarded children 13 years of age and younger. For the reasons stated in my opinion in *Parham* v. *J. R.* I believe that this is unconstitutional.

As a practical matter, mentally retarded children over 13 and children confined as mentally ill fare little better. While under current regulations these children must be informed of their right to a hearing and must be given the telephone number of an attorney within 24 hours of admission, see 459 F. Supp. 30, 49, 51 (ED Pa. 1978) (Broderick, J., dissenting),* the burden of contacting counsel and the burden of initiating proceedings is placed upon the child. In my view, this placement of the burden vitiates Pennsylvania's procedures. Many of the institutionalized children are unable to read, write, comprehend the formal explanation of their rights, or use the telephone. See App. 1019a (testimony of L. Glenn). Few, as a consequence, will be able to take the initiative necessary for them to secure the advice and assistance of a trained representative. Few will be able to trigger the procedural safeguards and hearing rights that Pennsylvania formally provides. Indeed, for most of Pennsylvania's institutionalized children the recitation of rights required by current regulations will amount to no more than a hollow ritual. If the children's constitutional rights to representation and to a fair hearing are to be guaranteed in substance as well as in form

*See also Pa. Stat. Ann., Tit. 16, § 9960.6 (c) (Purdon Supp. 1979) (Pennsylvania Public Defender obliged to represent institutionalized children in commitment and related proceedings).

and if the commands of the Fourteenth Amendment are to be satisfied, then waiver of those constitutional rights cannot be inferred from mere silence or inaction on the part of the institutionalized child. Cf. *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Pennsylvania must assign each institutionalized child a representative obliged to initiate contact with the child and ensure that the child's constitutional rights are fully protected. Otherwise, it is inevitable that the children's due process rights will be lost through inadvertence, inaction, or incapacity. See 459 F. Supp., at 44 n. 47; *Bartley* v. *Kremens*, 402 F. Supp. 1039, 1050–1051 (ED Pa. 1975).

WILSON ET AL. *v.* OMAHA INDIAN TRIBE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–160. Argued March 21, 1979—Decided June 20, 1979*

Pursuant to an 1854 treaty, the reservation of the Omaha Indian Tribe (Tribe) was established in the Territory of Nebraska on the west bank of the Missouri River, with the eastern boundary being fixed as the center of the river's main channel. In 1867, a General Land Office survey established that certain land was included in the reservation but since then the river has changed course several times, leaving most of the survey area on the Iowa side of the river, separated from the rest of the reservation. Residents of Iowa ultimately settled on and improved this land, and these non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs. Three federal actions, consolidated in District Court, were instituted by respondents, the Tribe and the United States as trustee of the reservation lands, against petitioners, including the State of Iowa and several individuals. Both sides sought to quiet title in their names, respondents arguing that the river's movement had been avulsive and thus did not affect the reservation's boundary, whereas petitioners argued that the disputed land had been formed by gradual accretion and belonged to the Iowa riparian owners. The District Court held that state rather than federal law should be the basis of decision; that 25 U. S. C. § 194—which provides that "[i]n all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership"—was not applicable because the Tribe could not make out a prima facie case that it possessed the disputed land in the past without proving its case on the merits; and that under Nebraska law, the changes in the river had been accretive and thus the petitioners were the owners of the disputed area. The Court of Appeals reversed, ruling that federal rather than state law was applicable; that the Tribe had made a sufficient showing to invoke

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*Together with No. 78–161, *Iowa et al.* v. *Omaha Indian Tribe et al.*, also on certiorari to the same court.

§ 194; and that applying the federal common law of accretion and avulsion to the evidence, the evidence was in equipoise and thus, under § 194, judgment must be entered for the Tribe.

Held:

1. The Court of Appeals was partially correct in ruling that § 194 is applicable here; by its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. In view of the history of § 194 and its purpose of protecting Indians from claims made by non-Indian squatters on their lands, it applies even when an Indian tribe is the litigant rather than one or more individual Indians. But, while Congress was aware that § 194 would be interpreted to cover artificial entities, such as corporations, as well as individuals, there is nothing to indicate that Congress intended the word "white person" to include any of the States of the Union. Here, there seems to be no question that the disputed land was once riparian land lying on the west bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the 1854 treaty, and this was enough to bring § 194 into play. In view of the purpose of the statute and its use of the term "presumption" which the "white man" must overcome, § 194 contemplates the non-Indian's shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession. Pp. 664–669.

2. The Court of Appeals properly concluded that federal law governs the substantive aspects of the dispute, but it erred in arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion. Pp. 669–679.

(a) The general rule that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways, *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, does not oust federal law in this litigation. Here, the United States has never yielded title or terminated its interest in the property, and, in these circumstances, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 677. Pp. 669–671.

(b) However, state law should be borrowed as the federal rule of decision here. There is no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute (the location of the boundary between Iowa and Nebraska having been settled by Compact in 1943). Furthermore,

given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests. And this is also an area in which the States have substantial interest in having their own law resolve controversies such as these; there is considerable merit in not having the reasonable expectations, under state real property law, of private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Cf. *Board of Comm'rs* v. *United States,* 308 U. S. 343; *Arkansas* v. *Tennessee,* 246 U. S. 158. Pp. 671–676.

(c) Under the construction of the 1943 Compact in *Nebraska* v. *Iowa,* 406 U. S. 117, Nebraska law should be applied in determining whether the changes in the river that moved the disputed land from Nebraska to Iowa were avulsive or accretive. Pp. 676–678.

575 F. 2d 620, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases. BLACKMUN, J., filed a concurring opinon, in which BURGER, C. J., joined, *post,* p. 679.

Edson Smith argued the cause for petitioners in No. 78–160. With him on the briefs were *Robert H. Berkshire, Thomas R. Burke, Lyman L. Larsen, Francis M. Gregory, Jr.,* and *Maurice B. Nieland. Bennett Cullison, Jr.,* argued the cause for petitioners in No. 78–161. With him on the brief were *Richard C. Turner,* Attorney General of Iowa, and *James C. Davis,* Assistant Attorney General.

William H. Veeder argued the cause and filed a brief for respondent Omaha Indian Tribe in both cases. *Sara Sun Beale* argued the cause for the United States in both cases. With her on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Barnett, Robert L. Klarquist,* and *Edward J. Shawaker.*†

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†*Edgar B. Washburn* filed a brief for Title Insurance and Trust Co. et al. as *amici curiae* urging reversal in both cases.

A brief of *amici curiae* urging reversal in No. 78–161 was filed for their respective States by *Theodore L. Sendak,* Attorney General of Indiana,

MR. JUSTICE WHITE delivered the opinion of the Court.

At issue here is the ownership of a tract of land on the east bank of the Missouri River in Iowa. Respondent Omaha

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Jane Gootee, Deputy Attorney General, and *Donald Bogard*; *William J. Baxley*, Attorney General of Alabama; *Avrum Gross*, Attorney General of Alaska; *John A. LaSota, Jr.*, Acting Attorney General of Arizona; *William J. Clinton*, Attorney General of Arkansas; *Carl R. Ajello*, Attorney General of Connecticut; *Richard R. Wier, Jr.*, Attorney General of Delaware; *Robert L. Shevin*, Attorney General of Florida; *Ronald Y. Amemiya*, Attorney General of Hawaii; *Wayne L. Kidwell*, Attorney General of Idaho; *William J. Scott*, Attorney General of Illinois; *Curt T. Schneider*, Attorney General of Kansas; *Robert F. Stephens*, Attorney General of Kentucky; *William J. Guste, Jr.*, Attorney General of Louisiana; *Joseph E. Brennan*, Attorney General of Maine; *Francis B. Burch*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *Frank J. Kelley*, Attorney General of Michigan; *A. F. Summer*, Attorney General of Mississippi; *John D. Ashcroft*, Attorney General of Missouri; *Paul L. Douglas*, Attorney General of Nebraska; *Robert List*, Attorney General of Nevada; *Thomas D. Rath*, Attorney General of New Hampshire; *Toney Anaya*, Attorney General of New Mexico; *Louis J. Lefkowitz*, Attorney General of New York; *Rufus L. Edmisten*, Attorney General of North Carolina; *Allen I. Olson*, Attorney General of North Dakota; *William J. Brown*, Attorney General of Ohio; *James A. Redden*, Attorney General of Oregon; *Daniel R. McLeod*, Attorney General of South Carolina; *William Janklow*, Attorney General of South Dakota; *William M. Leech, Jr.*, Attorney General of Tennessee; *Robert B. Hansen*, Attorney General of Utah; *M. Jerome Diamond*, Attorney General of Vermont; *J. Marshall Coleman*, Attorney General of Virginia; *Slade Gorton*, Attorney General of Washington; *Chauncey H. Browning, Jr.*, Attorney General of West Virginia; *Bronson C. La Follette*, Attorney General of Wisconsin; *John J. Rooney*, Acting Attorney General of Wyoming, and *Jack D. Palma II*, Senior Assistant Attorney General.

Robert S. Pelcyger, *Richard B. Collins*, and *Arthur Lazarus, Jr.*, filed a brief for the Native American Rights Fund et al. as *amici curiae* urging affirmance in both cases.

John C. Christie, Jr., *Charles T. Martin*, and *Stephen J. Landes* filed a brief for the American Land Title Assn. as *amicus curiae* in both cases.

A brief of *amici curiae* was filed in No. 78–161 for their respective States by *Evelle J. Younger*, Attorney General of California, *N. Gregory*

Indian Tribe, supported by the United States as trustee of the Tribe's reservation lands,[1] claims the tract as part of reservation lands created for it under an 1854 treaty. Petitioners, including the State of Iowa and several individuals, argue that past movements of the Missouri River washed away part of the reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian landowners.[2]

Two principal issues are presented. First, we are faced with novel questions regarding the interpretation and scope

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Taylor, Assistant Attorney General, and *John Briscoe* and *Bruce S. Flushman*, Deputy Attorneys General; *John L. Hill*, Attorney General of Texas; *Mike Greely*, Attorney General of Montana; *Warren Spannaus*, Attorney General of Minnesota; *Gerald Gornish*, Attorney General of Pennsylvania; and *J. D. MacFarlane*, Attorney General of Colorado, and *David W. Robbins*, Deputy Attorney General.

[1] In *Heckman* v. *United States*, 224 U. S. 413 (1912), the Court explained the source and nature of this trust relationship. In the exercise of its plenary authority over Indian affairs, Congress has the power to place restrictions on the alienation of Indian lands. Where it does so, it continues guardianship over Indian lands and "[d]uring the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. . . . A transfer of the [Indian land] is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Id.*, at 437–438. Accordingly, the United States is entitled to go into court as trustee to enforce Indian land rights. "It [is] not essential that it should have a pecuniary interest in the controversy." *Id.*, at 439. See also *Morrison* v. *Work*, 266 U. S. 481, 485 (1925); *Choate* v. *Trapp*, 224 U. S. 665, 678 (1912); F. Cohen, Handbook of Federal Indian Law 94–96 (1942).

[2] The State of Iowa claims title to certain lands deeded to it by quitclaim and to the bed of the Missouri between the thalweg (see n. 3, *infra*) and the ordinary high-water mark, any islands formed in that portion of the river, and any abandoned channels. The latter claims are based upon the equal-footing doctrine, see *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), and the 1943 Boundary Compact between Iowa and Nebraska, see n. 6, *infra*.

of Rev. Stat. § 2126, as set forth in 25 U. S. C. § 194, a 145-year-old, but seldom used, statute that provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Second, we must decide whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive.

I

In 1854, the Omaha Indian Tribe ceded most of its aboriginal lands by treaty to the United States in exchange for money and assistance to enable the Tribe to cultivate its retained lands. Treaty of Mar. 16, 1854, 10 Stat. 1043; see *United States* v. *Omaha Indians*, 253 U. S. 275, 277–278 (1920). The retained lands proved unsatisfactory to the Tribe, and it exercised its option under the treaty to exchange those lands for a tract of 300,000 acres to be designated by the President and acceptable to the Tribe. The Blackbird Hills area, on the west bank of the Missouri, all of which was then part of the Territory of Nebraska, was selected. The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg.[3] That land,

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[3] The term is commonplace in boundary disputes between riparian States. See, *e. g.*, *Minnesota* v. *Wisconsin*, 252 U. S. 273, 282 (1920):

"The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not neces-

as modified by a subsequent treaty and statutes,[4] has remained the home of the Omaha Indian Tribe.

In 1867, a survey by T. H. Barrett of the General Land Office established that the reservation included a large peninsula jutting east toward the opposite, Iowa, side of the river, around which the river flowed in an oxbow curve known as Blackbird Bend.[5] Over the next few decades, the river changed course several times, sometimes moving east, sometimes west.[6] Since 1927, the river has been west of its 1867 position, leaving most of the Barrett survey area on the Iowa side of the river, separated from the rest of the reservation.

As the area, now on the Iowa side, dried out, Iowa residents settled on, improved, and farmed it. These non-Indian owners and their successors in title occupied the land for many

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sarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

[4] Treaty of Mar. 6, 1865, 14 Stat. 667; Act of June 22, 1874, 18 Stat. 146, 170; Act of Aug. 7, 1882, 22 Stat. 341; see also Act of Mar. 3, 1885, 23 Stat. 362, 370, as amended by Act of Jan. 7, 1925, ch. 34, 43 Stat. 726.

[5] There is some dispute over whether the Barrett survey actually marked the reservation boundary because several years had passed since the Tribe began occupying the reservation and the Missouri may have changed its course during that period. See *United States* v. *Wilson*, 433 F. Supp. 67, 69, 74 (ND Iowa 1977). This does not appear to be of significance in this litigation. *Id.*, at 75.

[6] In *Nebraska* v. *Iowa*, 143 U. S. 359 (1892), the Court decided a boundary dispute between the States of Nebraska and Iowa caused by the wanderings of the Missouri. "[T]he fickle Missouri River," however, "refused to be bound by the . . . decree," Eriksson, The Boundaries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927); and in 1943 Nebraska and Iowa entered into a Compact fixing the boundary between the States independent of the river's location. Congress ratified the Compact in the Act of July 12, 1943, ch. 220, 57 Stat. 494. Since the time of the Compact, the Army Corps of Engineers has been largely successful in taming the river. See *Nebraska* v. *Iowa*, 406 U. S. 117, 119 (1972).

years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs.

Four lawsuits followed the seizure, three in federal court and one in state court. The Federal District Court for the Northern District of Iowa consolidated the three federal actions, severed claims to damages and lands outside the Barrett survey area, and issued a temporary injunction that permitted the Tribe to continue possession. The court then tried the case without a jury. At trial, the Government and the Tribe argued that the river's movement had been avulsive, and therefore the change in location of the river had not affected the boundary of the reservation. Petitioners argued that the river had gradually eroded the reservation lands on the west bank of the river, and that the disputed land on the east bank, in Iowa, had been formed by gradual accretion and belonged to the east-bank riparian owners.[7] Both sides sought to quiet title in their names.

The District Court concluded that state rather than federal law should be the basis of decision. *United States* v. *Wilson*, 433 F. Supp. 57 (1977). The court interpreted the Rules of Decision Act, 28 U. S. C. § 1652, as not requiring the applica-

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[7] The District Court stated the common-law rule, 433 F. Supp. 57, 62 (1977):

"Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935). On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel. *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). The jurisdiction of Nebraska applies these principles to the movements of the Missouri River. *DeLong v. Olsen*, 63 Neb. 327, 88 N. W. 512 (1901)."

This Court has followed the same principles resolving boundary disputes between States bordering on navigable streams. *Arkansas* v. *Tennessee*, 246 U. S. 158, 173 (1918); *Missouri* v. *Nebraska*, 196 U. S. 23, 34–36 (1904); *Nebraska* v. *Iowa*, 143 U. S., at 360–361, 370.

tion of federal law in land disputes, even though the United States and an Indian tribe were claimants,[8] unless the Constitution, a treaty, or an Act of Congress specifically supplanted state law. The court found no indication in those sources that federal law was to govern. It then went on to conclude that 25 U. S. C. § 194 was not applicable to the case because it was impossible for the Tribe to make out a prima facie case that it possessed the disputed lands in the past without proving its case on the merits. Thus, § 194 had no significance because it was "inextricably entwined with the merits." 433 F. Supp., at 66.[9]

Applying Nebraska law,[10] which places the burden of proof on the party seeking to quiet title, the court concluded that the key changes in the river had been accretive, and that the east-bank riparians, the petitioners, were thus the owners of the disputed area. 433 F. Supp. 67 (1977).[11]

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[8] The District Court relied on *Mason* v. *United States*, 260 U. S. 545 (1923); *Francis* v. *Francis*, 203 U. S. 233 (1906); and *Fontenelle* v. *Omaha Tribe of Nebraska*, 298 F. Supp. 855 (Neb. 1969), aff'd, 430 F. 2d 143 (CA8 1970).

[9] The District Court also suggested that the possessory interest of the Tribe was not of sufficient quality to trigger the burden shifting contemplated by 25 U. S. C. § 194.

[10] The District Court construed the Court's decision in *Nebraska* v. *Iowa*, 406 U. S. 117 (1972), as requiring the application of Nebraska law with respect to changes in the river that occurred before 1943, the date of the Iowa-Nebraska Compact that permanently fixed the boundary between the States, because the land at issue here was indisputably part of Nebraska before the river changed its course. 433 F. Supp., at 60, and n. 2.

[11] Although the District Court hewed closely to Nebraska case law, it also observed that insofar as the relevant definitions of avulsion and accretion were concerned, there was no significant difference between Iowa and Nebraska law, except that under Iowa law accretion was presumed, which was not the case under Nebraska law. Because Nebraska law would not aid the defendants by a presumption of accretion, the Tribe was favored by the application of Nebraska law. The District Court was also of the view that the federal accretion-avulsion law was not substantially different. As

The Court of Appeals reversed. 575 F. 2d 620 (CA8 1978). It began by ruling that the District Court should have applied federal rather than state law for two distinct reasons. First, the boundary of the reservation was coincidental with an interstate boundary at the time the river moved. Therefore, under *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375 (1977), and other cases of this Court, the governing law is federal because

> "[t]he rendering of a decision in a private dispute which would 'press back' an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law." 575 F. 2d, at 628.

Second, the Court of Appeals construed our decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 677 (1974), as requiring the application of federal law because the Tribe asserted a right to reservation land based directly on the 1854 treaty and therefore arising under and protected by federal law.

The Court of Appeals also ruled that the District Court had erred by refusing to apply 25 U. S. C. § 194. Because the Tribe had proved that the 1854 treaty included the land area within the Barrett survey, it had made a sufficient showing of "previous possession or ownership" to invoke the statute and place the burden of proof on petitioners. Adopting the District Court's construction "would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river." 575 F. 2d, at 631.

Reviewing what it perceived to be the federal common law of accretion and avulsion and with no more than passing reference to Nebraska law on the issue, the Court of Appeals concluded that the District Court had based its ruling on a

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we shall see, the Court of Appeals differed with the District Court in this respect.

too narrow definition of avulsion.[12] The court then applied the law to the evidence and found that the evidence was in equipoise. Because § 194 placed the burden of proof on the non-Indians, however, the court ruled that judgment must be entered for the Tribe.

We granted separate petitions for certiorari filed by the State of Iowa and its Conservation Commission in No. 78–161 and by the individual petitioners in No. 78–160, but limited to the questions whether 25 U. S. C. § 194 is applicable in the circumstances of this litigation, in particular with respect to the State of Iowa, and whether federal or state law governs the substantive aspects of these cases. 439 U. S. 963 (1978).[13]

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[12] The Court of Appeals relied on two cases, *Veatch* v. *White*, 23 F. 2d 69 (CA9 1927), and *Uhlhorn* v. *United States Gypsum Co.*, 366 F. 2d 211 (CA8 1966), cert. denied, 385 U. S. 1026 (1967), in concluding that, under federal law, "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." 575 F. 2d 620, 637 (CA8 1978). This definition was broader than the Nebraska rule as understood and applied by the District Court, which the Court of Appeals described as follows: "an avulsion occurs only where a sudden shift in a channel cuts off land 'so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed.'" *Id.*, at 634, quoting 433 F. Supp., at 73. As is evident, the definition employed by the Court of Appeals permits a finding of avulsion even where the river is still largely within its original bed.

[13] In No. 78–161, filed by the State of Iowa and its Conservation Commission, the questions on which certiorari was granted were stated as follows:

"Whether the State of Iowa is 'a white person', and the Omaha Indian Tribe is 'an Indian' within the meaning of 25 U. S. C. § 194.

. . . . .

"Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."

In No. 78–160, we granted certiorari on the following questions:

"Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.

"Whether the Eighth Circuit erred in holding that Federal and not state

We are in partial, but serious, disagreement with the Court of Appeals, and vacate its judgment.

II

Petitioners challenge on several grounds the Court of Appeals' construction and application of § 194 to these cases.[14] First, they argue that by its plain language the section does not apply when an Indian tribe, rather than one or more individual Indians, is the litigant. We think the argument is untenable. The provision first appeared in slightly different form in 1822, Act of May 6, 1822, 3 Stat. 683, as part of an Act amending the 1802 Indian Trade and Intercourse Act, Act of Mar. 30, 1802, 2 Stat. 139, which was one of a series of Acts originating in 1790 and designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians.[15] Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions. The 1822 provision was part of this design; and with only slight change in wording, it was incorporated in the 1834 consolidation of the various statutes dealing with

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common law with regard to accretion and avulsion is applicable in this case."

[14] Of these various arguments, only the single ground relied on by the District Court in refusing to apply § 194 was discussed and rejected by the Court of Appeals. The other grounds for holding § 194 inapplicable to this case were presented by petitioners either in their briefs on the merits before the Court of Appeals or their petition for rehearing before that court after it reversed the District Court.

[15] The background, history, and development of these laws and Acts are explored exhaustively in F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790–1834 (1962). See also Cohen, *supra* n. 1, at 68–75.

Indian affairs. Act of June 30, 1834, 4 Stat. 729. Section 22 of that Act is now 25 U. S. C. § 194, already set out in this opinion. Although the word "Indian" in the second line of § 22 of the 1834 Act replaced the word "Indians" in the 1822 provision, there is no indication that any change in meaning was intended; and none should be implied at this late date, particularly in light of 1 U. S. C. § 1, which provides that unless the context indicates otherwise, "words importing the singular include and apply to several persons, parties, or things."

Even construed as including the plural, however, it is urged that the word "Indians" does not literally include an Indian tribe, and that it is plain from other provisions of the Act that Congress intended to distinguish between Indian tribes and individual Indians. But as we see it, this proves too much. At the time of the enactment of the predecessors of § 194, Indian land ownership was primarily tribal ownership; aboriginal title, a possessory right, was recognized and was extinguishable only by agreement with the tribes with the consent of the United States. *Oneida Indian Nation* v. *County of Oneida,* 414 U. S., at 669–670. Typically, this was accomplished by treaty between the United States and the tribe, and typically the land reserved or otherwise set aside was held in trust by the United States for the tribe itself. " 'Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.' " *United States* v. *Jim,* 409 U. S. 80, 82 (1972), quoting *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307 (1902). It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made by non-Indian squatters on their lands. To limit the force of these provisions to lands held by individual Indians would be to drain them of all significance, given the historical fact that at the time of the enactment virtually all Indian land was

tribally held. Legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it]." *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 206 (1978). Furthermore, " 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' " *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976), quoting *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918).

The second argument, presented in its most acute form by the State of Iowa, is that § 194 applies only where the Indians' antagonist is an individual white person and has no force at all where the adverse claimant is an artificial entity.[16] We cannot accept this broad submission. The word "person" for purposes of statutory construction, unless the context indicates to the contrary, is normally construed to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U. S. C. § 1. And in terms of the protective purposes of the Acts of which § 194 and its predecessors were a part, it would make little sense to construe the provision so that individuals, otherwise subject to its burdens, could escape its reach merely by incorporating and carrying on business as usual. As we said in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 687 (1978), "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory anal-

[16] Petitioners cite *United States* v. *Perryman*, 100 U. S. 235 (1880), as support for their position that § 194 must be construed literally to apply only to a "white person," or individual Caucasian. But that case dealt with another provision of the 1834 Nonintercourse Act, § 16, and there were distinct grounds in the legislative history indicating that the term "white person" as used in § 16 did not include a Negro. Whether *Perryman* would be followed today is a question we need not decide.

ysis." [17] It stands to reason that in re-enacting this provision in the Revised Statutes, now codified in the United States Code, Congress was fully aware that it would be interpreted to cover artificial entities as well as individuals.

It nevertheless does not follow that the "white persons" to whom will be shifted the burden of proof in title litigation with Indians also include the sovereign States of the Union. "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *United States* v. *Cooper Corp.*, 312 U. S. 600, 604 (1941); accord, *United States* v. *Mine Workers*, 330 U. S. 258, 275 (1947). Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage. *United States* v. *Knight*, 14 Pet. 301, 315 (1840). There is nevertheless "no hard and fast rule of exclusion," *United States* v. *Cooper Corp.*, *supra*, at 604–605; and much depends on the context, the subject matter, legislative history, and executive interpretation. The legislative history here is uninformative, and executive interpretation is unhelpful with respect to this dormant statute. But in terms of the purpose of the provision—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the States so as to offset the likelihood of unfair advantage. Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section." H. R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of

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[17] There were two corporate defendants among the parties in the District Court. They filed a separate petition for certiorari, No. 78–162, *RGP, Inc.* v. *Omaha Indian Tribe*, but no action has yet been taken on it. Under our Rules, however, the two corporations are party-respondents in the cases in which we have granted certiorari. Rule 21 (4).

the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished . . . ." 4 Stat. 729. Although this definition was discarded in the Revised Statutes, see Rev. Stat. § 5596, it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.

Nor have we discovered anything since its passage or in connection with the definition of Indian country now contained in the Criminal Code, 18 U. S. C. § 1151, indicating that Congress intended the words "white person" in § 194 to include any of the original or any of the newly admitted States of the Union. We hesitate, therefore, to hold that the State of Iowa must necessarily be disadvantaged by § 194 when litigating title to the property to which it claims ownership, particularly where its opposition is an organized Indian tribe litigating with the help of the United States of America. It may well be that a State, like other litigants and like the State of Iowa did in this case, will often bear the burden of proof on various issues in litigating the title to real estate. But § 194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute.

Petitioners also defend the refusal of the District Court to apply § 194 on the grounds that a precondition to applying it is proof of prior possession or title in the Indians and that this involves the merits of the issue on which this case turns—whether the changes in the river were avulsive or accretive. We think the Court of Appeals had the better view of the statute in this regard. Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute. The usual way of describing

real property is by identifying an area on the surface of the earth through the use of natural or artificial monuments. There seems to be no question here that the area within the Barrett survey was once riparian land lying on the *west* bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854. This was enough, it seems to us, to bring § 194 into play. Of course, that would not foreclose the State of Iowa from offering sufficient evidence to prove its own title or from prevailing on any affirmative defenses it may have.

Petitioners also assert that even if § 194 is operative and even if the Tribe has made out its prima facie case, only the burden of going forward with the evidence, and not the burden of persuasion, is shifted to the State. Therefore they, the petitioners, should prevail if the evidence is in equipoise. The term "burden of proof" may well be an ambiguous term connoting either the burden of going forward with the evidence, the burden of persuasion, or both. But in view of the evident purpose of the statute and its use of the term "presumption" which the "white man" must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian's shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession.

III

A

In *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), this Court held that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways. This was expressive of the general rule with respect to the incidents of federal land grants:

> " 'We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a

> title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever,* according to those laws, *the title shall have passed,* then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.' " *Id.*, at 377, quoting *Wilcox* v. *Jackson,* 13 Pet. 498, 517 (1839) (emphasis added by the *Corvallis* Court).

The Court's conclusion in the particular dispute before it in *Corvallis* was that state law governed the rights of the riparian owner because there was no claim of an applicable federal right other than the equal-footing origin of the State's title.

As the Court of Appeals held, however, the general rule recognized by *Corvallis* does not oust federal law in this case. Here, we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest. The area within the survey was part of land to which the Omahas had held aboriginal title and which was reserved by the Tribe and designated by the United States as a reservation and the Tribe's permanent home. The United States continues to hold the reservation lands in trust for the Tribe and to recognize the Tribe pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*

In these circumstances, where the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation* v. *County of Oneida,* 414 U. S., at 677. It is rudimentary that "Indian title is a matter of federal law and can be extinguished only with federal consent" and that the termination of the protection

that federal law, treaties, and statutes extend to Indian occupancy is "exclusively the province of federal law." *Id.*, at 670. Insofar as the applicable law is concerned, therefore, the claims of the Omahas are "clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." *Id.*, at 684 (REHNQUIST, J., concurring). This is not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantees' incidents of ownership to determination by the applicable state law. The issue here is whether the Tribe is no longer entitled to possession of an area that in the past was concededly part of the reservation as originally established. That question, under *Oneida*, is a matter for the federal law to decide.[18]

B

Although we have determined that federal law ultimately controls the issue in this case, it is still true that "[c]ontro-

[18] Petitioners claim that *Oklahoma* v. *Texas*, 258 U. S. 574 (1922), mandates the applicability of state rather than federal law in this case. But there the United States issued patents granting former reservation lands. The Court merely held that, absent contrary evidence, when the United States conveyed and completely parted with its territory, even though Indian land, it intended the incidents of the resulting ownership to be determined by state law. This is no more than the general rule that *Oneida* recognized. In the present case, of course, the area at issue was never conveyed away by the United States or by the Tribe and is claimed by the United States and the Tribe to remain as part of the reservation established as the result of the treaty of 1854. Neither do we find that *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 206 (1943), presents a contrary holding. There, the Court refused to construe a federal statute permitting the Secretary of the Interior to grant permission for the opening of highways over Indian land "in accordance with the laws of the state" as prohibiting the establishment of a power line in the highway right-of-way without further federal consent. *Id.*, at 208. As we understand that case, the Court held only that the consent authorized by the federal statute included the uses which such consent would authorize under state law.

versies . . . governed by federal law, do not inevitably require resort to uniform federal rules. . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 727–728 (1979), quoting *United States* v. *Standard Oil Co.*, 332 U. S. 301, 310 (1947).[19] The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes between States having their common border on a navigable stream, purported to find in those doctrines the legal standards to apply in deciding whether the changes in the course of the Missouri River involved in this case had been avulsive or accretive in nature.

The federal law applied in boundary cases, however, does not necessarily furnish the appropriate rules to govern this case. No dispute between Iowa and Nebraska as to their common border on or near the Missouri River is involved here. The location of that border on the ground was settled by Compact in 1943 and by further litigation in this Court, *Nebraska* v. *Iowa*, 406 U. S. 117 (1972). The federal interest in this respect has thus been satisfied, except to the extent that the Compact itself may bear upon a dispute such as this. *United States* v. *Kimbell Foods, Inc., supra*, advises that at this juncture we should consider whether there is need for

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[19] Compare P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 768 (2d ed. 1973):

"The federal 'command' to incorporate state law may be a judicial rather than a legislative command; that is, it may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should 'govern' a given question, state law furnishes an appropriate and convenient measure of the content of this federal law."

a nationally uniform body of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law. An application of these factors suggests to us that state law should be borrowed as the federal rule of decision here.

First, we perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal, law. It is true that States may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions, but as long as the applicable standard is applied evenhandedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute. We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]." *United States* v. *Kimbell Foods, Inc., supra,* at 730.

Furthermore, given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests. On some occasions, Indian tribes may lose some land because of the application of a particular state rule of accretion and avulsion, but it is as likely on other occasions that the tribe will stand to gain. The same would be the case under a federal rule, including the rule that the Court of Appeals announced in this case. The United States fears a hostile and unfavorable treatment at the hands of state law, but, as we have said, the legal issues are federal and the federal courts will have jurisdiction to

hear them. *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661 (1974). Adequate means are thus available to insure fair treatment of tribal and federal interests.

This is also an area in which the States have substantial interest in having their own law resolve controversies such as these. Private landowners rely on state real property law when purchasing real property, whether riparian land or not. There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Borrowing state law will also avoid arriving at one answer to the avulsive-accretion riddle in disputes involving Indians on one side and possibly quite different answers with respect to neighboring land where non-Indians are the disputants. Indeed, in this case several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals.

We have borrowed state law in Indian cases before. In *Board of Comm'rs* v. *United States*, 308 U. S. 343 (1939), the question was what law, federal or state, would apply in a claim to recover taxes improperly levied by a political subdivision of a State upon Indians' trust lands. The Court observed that "[s]ince the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas." *Id.*, at 349–350. The Court, nevertheless, elected to adopt state law as the federal rule of decision. There was no reason in the circumstances of the case for the beneficiaries of federal rights to have a privileged position over other aggrieved taxpayers, and "[t]o respect the law of interest prevailing in Kansas in no wise impinges upon the exemption

which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate." [20]

The importance of attending to state law, once an interstate boundary has been determined, is underlined by *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918). In that case, because the disputed boundary between Arkansas and Tennessee had been determined, the question of title to riparian land and to the river bottom was a matter to be determined by local law:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and

[20] See *Board of Comm'rs* v. *United States,* 308 U. S., at 351–352:

"Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, see *Stone* v. *White,* 301 U. S. 532, 534, Congress has left us free to take into account appropriate considerations of 'public convenience.' Cf. *Virginian Ry. Co.* v. *Federation,* 300 U. S. 515, 552. Nothing seems to us more appropriate than due regard for local institutions and local interests. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected by their local laws. See, e. g., § 5 of the General Allotment Act of 1887, 24 Stat. 388, 389. With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See *Brown* v. *United States,* 263 U. S. 78; *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate."

> the riparian lands adajacent to them. . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located." *Id.*, at 175–176.

Likewise, in the present case, the Compact of 1943 settled the location of the interstate boundary, within and without the river; and the question of land ownership within or adjacent to the river is best settled by reference to local law even where Indian trust land, a creature of the federal law, is involved.

C

The passage quoted above from *Arkansas* v. *Tennessee* was quoted with approval in *Nebraska* v. *Iowa*, 406 U. S., at 126–127, where the central question was the interpretation of the Interstate Compact determining the location of the entire border between Nebraska and Iowa.[21] Our opinion in *Nebraska* v. *Iowa* is also instructive with respect to which state law, Iowa or Nebraska, the federal court should refer to in determining the federal standard applicable to this case.

Under § 2 of the Compact, each State ceded to the other and relinquished jurisdiction over all lands within the Compact boundary of the other State. Under § 3, "Titles, mortgages, and other liens" affecting such lands that are "good in" the ceding State "shall be good in" the other State.[22]

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[21] The Special Master in that case observed that, although it would be difficult, the location of the agreed-upon boundary in the Compact could be determined with reasonable accuracy. Report of Special Master in *Nebraska* v. *Iowa*, O. T. 1964, No. 17 Orig., p. 50.

[22] See 1943 Iowa Acts, ch. 306, as ratified by Act of July 12, 1943, ch. 220, 57 Stat. 494:

"Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

"Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending

Thus, ceded lands east of the Compact line came under Iowa jurisdiction; but Iowa was obligated to respect title to any ceded land east of the new boundary if that title was "good in" Nebraska. Accepting the Special Master's recommendations in this respect, the Court ruled that one claiming a Nebraska title to land east of the Compact line need show only "good title" under Nebraska law and need not also prove either the location of the original boundary between the two States or that the land at issue was on the Nebraska side of that original boundary. The Court further ruled, in agreement with the Special Master, that in litigating with private claimants seeking to prove good Nebraska title to land east of the Compact line, the State of Iowa was disentitled to rely on certain doctrines of Iowa common law bearing on riparian land ownership.[23]

In this case, the District Court ruled that even though the United States and an Indian tribe rather than private parties were plaintiffs, title to the Barrett survey land, which was once in Nebraska but is now unquestionably in Iowa, should be governed by Nebraska law in accordance with the terms of the Compact. Proceeding to adjudicate the case in accordance with Nebraska law, the District Judge found that the Tribe and the Government, respondents here, had failed to prove that the Blackbird Bend area had been separated from the rest of the reservation by avulsive changes in the Missouri River and that the defendants, petitioners here, without the aid of any presumption of accretion available under Iowa law

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suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

[23] Under this ruling, Iowa was disentitled, either as plaintiff or defendant, from invoking its presumption that changes in the Missouri had been accretive rather than avulsive, and could not rely on its rule that no person can claim adversely against the sovereign State of Iowa. Thus, a title based on adverse possession good under Nebraska law would be good in Iowa. Report of Special Master, *supra,* at 174–175.

if applicable, had instead proved that the river changes had been by accretion. In the course of arriving at this conclusion, the District Court, relying on Nebraska cases, rejected the Government's definition of avulsion, later embraced by the Court of Appeals, as contrary to the common law of Nebraska. The defendants, petitioners here, having carried the burden of proving their good title to the land at issue, were entitled to a decree quieting title in them.

Although we have already held that the District Court erred in concluding that determination of titles to reservations lands is not a matter for the federal law, we have also indicated that the federal law should incorporate the applicable state property law to resolve the dispute. Therefore, it seems to us that the District Court reached the correct result in ruling that under the construction of the Compact in *Nebraska* v. *Iowa*, Nebraska law should be applied in determining whether the changes in the river that moved the Blackbird Bend area from Nebraska to Iowa had been avulsive or accretive. It should also be noted that the District Court, although wrong in wholly rejecting the applicability of § 194, concluded as a matter of fact and law that the defendants, petitioners here, had carried the burden of persuasion normally incumbent upon a plaintiff in a quiet-title action, and had proved by a preponderance of the evidence that the reservation lands had eroded and had accreted to the Iowa shoreline. Apparently for this reason, the trial judge observed at the end of his memorandum opinion that were he wrong in refusing to apply § 194, his findings and conclusions "would not be altered by any different allocation of the burden of persuasion." 433 F. Supp., at 67.

IV

In sum, the Court of Appeals was partially correct in ruling that § 194 was applicable in this case. By its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. We also agree with the Court of Appeals' conclu-

sion that federal law governed the substantive aspects of the dispute, but find it in error for arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion. Instead, the court should have incorporated the law of the State that otherwise would have been applicable which, as we have said, is the law of Nebraska. Of course, because of its view of the controlling law, the Court of Appeals did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case. These tasks are still to be performed, and we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion, but I write briefly to add a comment about my views as to the scope of 25 U. S. C. § 194.

Section 194 applies to a property dispute between an Indian and a "white person." The property dispute here is between Indians, on the one hand, and, on the other, nine individuals, two corporations, and the State of Iowa. See 575 F. 2d 620, 622 (CA8 1978). The Court holds that "white person" includes an artificial entity and thus that § 194 applies in the dispute between the Omahas and the two corporate petitioners. *Ante,* at 666–667. Contrariwise, the Court holds that "white person" does not include a sovereign State, and thus that § 194 does not apply in the dispute between the Omahas and petitioner State of Iowa. *Ante,* at 667–668, 678. The Court, however, does not expressly discuss § 194's applicability to the nine individual claimants.

Since the Court nevertheless holds that "§ 194 applies to the private petitioners" without exception, *ante*, at 678, it must be proceeding on one of two assumptions. The Court could assume, first, that all nine individual petitioners are Caucasians, and hence each literally is a "white person" under § 194. There is no evidence in the record, however, as to the race of these individuals. See Brief for Petitioners in No. 78–160, p. 30; Brief for United States 32 n. 25; Tr. of Oral Arg. 13. Since the burden of proving the factual predicate for § 194's applicability presumably rests on the Indians who seek to invoke it, the Court, in holding § 194 applicable to the individual petitioners here, could not properly rely on this first possible assumption.

The Court could assume, second, that "white person" in § 194 refers, not to a Caucasian, but to a "non-Indian" individual. On this assumption, the race of the individual petitioners (so long as they are not Indians) would be irrelevant in determining § 194's applicability. That this is in fact the assumption the Court makes is suggested by its decision to ignore the adjective "white" in holding each of the corporate petitioners to be a "white person," and by its refusal to follow *United States* v. *Perryman*, 100 U. S. 235 (1880), where it was held that "white person," as used in another section of the Non-Intercourse Act, did not include a Negro. *Ante*, at 666 n. 16.

The Court seems to hold implicitly, therefore, that "white person" in § 194 includes any "non-Indian" individual. I would prefer to make this holding explicit. In my view, any other construction of § 194 would raise serious constitutional questions. To construe § 194 as applicable to disputes between Indians and Caucasians, but not to disputes between Indians and black or oriental individuals, would create an irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee. To

avoid this result, § 194's reference to a "white person" must be read to mean any "non-Indian" individual or entity, and I so interpret the Court's holding today. To the extent that *Perryman* is inconsistent with this reading, I must regard that case as overruled *sub silentio*.

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* YAMASAKI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-1511. Argued March 19, 1979—Decided June 20, 1979

Section 204 (a) (1) of the Social Security Act (Act) authorizes the Secretary of the Department of Health, Education, and Welfare to recoup erroneous overpayments made to a beneficiary under the old-age, survivors', or disability insurance programs by decreasing future payments to which the overpaid person is entitled. However, § 204 (b) commands that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment would defeat the purpose of this subchapter or would be against equity and good conscience." Under the Secretary's practice, after an *ex parte* determination is made under § 204 (a) that an overpayment has been made, and after the recipient is notified of that determination, the recipient may file a written request seeking reconsideration of the determination or asking the Secretary to waive recovery in accordance with § 204 (b). If, upon review of the papers, the decision goes against the recipient, recoupment begins and the recipient is given an opportunity for an oral hearing only if he thereafter continues to object to recoupment. The recipient may seek subsequent administrative review, and finally may seek review by a federal court under § 205 (g) of the Act, which provides that any person, after any final decision of the Secretary made after a hearing to which he was a party, may obtain review of the decision by instituting a civil action. Respondents, who had unsuccessfully sought administrative relief from recoupment determinations, instituted federal actions, alleging that because they had not been given adequate notice and an opportunity for an oral hearing before recoupment began, the recoupment procedures violated both § 204 and the Due Process Clause of the Fifth Amendment. In each action, class certification was sought, and in one action it was requested that the class be nationwide. The respective District Courts granted class certification, held that the Secretary's recoupment procedures were unconstitutional, and ordered injunctive relief. The Court of Appeals consolidated the cases on appeal and upheld the certification of the classes. On the merits, the court, without directly addressing respondents' statutory claims, held, *inter alia*, that when waiver of recoup-

ment was requested pursuant to § 204 (b), the Due Process Clause required that the recipient be given an oral hearing before recoupment began, but that a prior hearing was not required in § 204 (a) reconsideration cases if the dispute centered on a computational error or a payment problem not demanding an evaluation of credibility.

Held:

1. Recipients who file a written request for waiver under § 204 (b) are entitled to the opportunity for a prerecoupment oral hearing, but those who merely request reconsideration under § 204 (a) are not so entitled. Pp. 692–697.

(a) On its face, § 204 requires that the Secretary make a prerecoupment waiver decision, and that the decision, like that concerning the fact of the overpayment, be accurate. Pp. 693–695.

(b) Neither § 204 nor the standards of the Due Process Clause require prerecoupment oral hearings as to requests under § 204 (a) for reconsideration as to whether overpayment occurred. The rare instance in which a credibility dispute is relevant to a § 204 (a) claim is not sufficient to require the Secretary to grant a hearing to the few requests that involve credibility. However, with respect to § 204 (b) waiver of the Secretary's right to recoup, the nature of the statutory standards involving determinations of "fault" and whether recoupment would be "against equity and good conscience" makes a prerecoupment oral hearing essential when a recipient requests waiver. Pp. 695–697.

2. Nothing in § 205 (g) prohibits the prerecoupment hearing relief awarded in this case. Pp. 697–706.

(a) Where a district court has jurisdiction over the claims of the members of the class in accordance with the requirements set out in § 205 (g), it also has discretion under Fed. Rule Civ. Proc. 23 to certify a class action for the litigation of those claims. Pp. 698–701.

(b) There was no abuse of discretion in certifying a nationwide class. Pp. 701–703.

(c) While the classes certified here exceed the bounds permitted by § 205 (g)'s "final decision" requirement because they include persons who have not filed requests for reconsideration or waiver in the past and will not do so in the future, nevertheless there is no basis for altering the relief actually granted, as it did not include those who do not meet such requirement. Pp. 703–704.

(d) Injunctive relief may be awarded in a § 205 (g) proceeding, nothing in either the language or the legislative history of the statute indicating that Congress intended to preclude injunctive relief. Pp. 704–706.

564 F. 2d 1219, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Peter Buscemi argued the cause for petitioner *pro hac vice*. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock*, and *William Kanter*.

Stanley E. Levin argued the cause for respondents. With him on the brief was *Jeff Spence*.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner, the Secretary of the Department of Health, Education, and Welfare (HEW), has determined that respondents, beneficiaries under the Social Security Act, have been overpaid. He seeks to recoup those overpayments by withholding future benefits to which respondents would otherwise be entitled. Respondents in turn have requested reconsideration or waiver of recoupment under § 204 of the Act, 42 U. S. C. § 404. The primary questions in this case are whether petitioner must grant respondents the opportunity for an oral hearing before recoupment begins, and whether jurisdiction under § 205 (g) of the Act, 42 U. S. C. § 405 (g), permits a federal district court to certify a nationwide class and grant injunctive relief.

I

Section 204 (a)(1) of the Social Security Act, 53 Stat. 1368, as amended, 42 U. S. C. § 404 (a)(1), authorizes the recovery of overpayments made to a beneficiary under the old-age, survivors', or disability insurance programs administered by HEW. In particular, it permits the Secretary to recoup

*Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; by *Edward C. King* for the Gray Panthers; and by *Charles A. Bane, Thomas D. Barr, Norman Redlich, Robert A. Murphy, Norman J. Chachkin, Richard S. Kohn*, and *Stuart E. Schmitz* for the Lawyers' Committee for Civil Rights Under Law.

erroneous overpayments by decreasing future payments to which the overpaid person is entitled.

Section 204 (b), however, expressly limits the recoupment authority conferred by § 204 (a)(1). Section 204 (b), as set forth in 42 U. S. C. § 404 (b), commands that

> "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." [1]

The Secretary has undertaken to define the terms employed in § 204 (b). Under his regulations, "without fault" means that the recipient neither knew nor should have known that the overpayment or the information on which it was based was incorrect. 20 CFR § 404.507 (1978). For example, a recipient who justifiably relied upon erroneous information from

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[1] In pertinent part, § 204 (a), as set forth in 42 U. S. C. § 404 (a), provides:

"Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

"(1) With respect to payment to a person [of] more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments of such overpaid person, or shall apply any combination of the foregoing."

Section 204 (b), as set forth in 42 U. S. C. § 404 (b), reads in full:

"In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

an official source within the Social Security Administration would be "without fault." § 404.510.

The regulations say that to "defeat the purpose of the subchapter" is to "deprive a person of income required for ordinary and necessary living expenses." § 404.508 (a). Those expenses are defined to include, among other things, food, rent, and medical bills. §§ 404.508 (a)(1) and (2). Recoupment is "against equity and good conscience" when the recipient "because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right . . . or changed his position for the worse." § 404.509. An example of detrimental reliance that would be sufficient is permitting private hospital insurance to lapse in the mistaken expectation of receiving federal hospital benefits. *Ibid.*

The Secretary's practice is to make an *ex parte* determination under § 204 (a) that an overpayment has been made, to notify the recipient of that determination, and then to shift to the recipient the burden of either (i) seeking reconsideration to contest the accuracy of that determination, or (ii) asking the Secretary to forgive the debt and waive recovery in accordance with § 204 (b).[2] If a recipient files a written request for reconsideration or waiver, recoupment is deferred pending action on that request. Social Security Claims Manual §§ 5503.2 (c), 5503.4 (b) (Dec. 1978) (Claims Manual). The papers are sent to one of the seven regional offices where the request is reviewed.

If the regional office decision goes against the recipient, recoupment begins. The recipient's monthly benefits are reduced or terminated[3] until the overpayment has been re-

[2] Although during 1977 the average overpayment to old-age and survivors' insurance beneficiaries who were overpaid exceeded $500, only 3.4% of those thus subject to recoupment sought waiver. Brief for Petitioner 45, and n. 33. These figures do not include disability beneficiaries. *Ibid.* See also *Elliott* v. *Weinberger*, 371 F. Supp. 960, 967 (Haw. 1974).

[3] The Secretary has altered his procedures in several respects since the initiation of this litigation, including: (i) rather than terminate all bene-

couped. Only if the recipient continues to object is he given an opportunity to present his story in person to someone with authority to decide his case. That opportunity takes the form of an on-the-record *de novo* evidential hearing before an independent hearing examiner. 20 CFR §§ 404.917, 404.931 (1978). The recipient may seek subsequent review by the Appeals Council, § 404.945, and finally by a federal court. § 205 (g) of the Act, 42 U. S. C. § 405 (g). If it is decided that the Secretary's initial determination was in error, the amounts wrongfully recouped are repaid.

II

The *Elliott* Case [4]

The Secretary overpaid the Hawaii respondents,[5] and notified them of his determination to recoup the overpayments. After unsuccessful attempts to obtain administrative relief, they brought suit in the United States District Court for the District of Hawaii challenging the legality of the Secretary's recoupment procedures. They alleged that, because the

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fits until recoupment is completed, the Secretary now in nonfraud cases usually reduces the recipient's monthly payments by only 25%, see Claims Manual § 5515 (Jan. 1979); and (ii) recipients who report excessive earnings and are found to have been overpaid now receive notice before, rather than after, recoupment begins. See *Elliott* v. *Weinberger*, 564 F. 2d 1219, 1223 (CA9 1977). Neither party contends that these changes moot this case.

[4] Respondent Evelyn Elliott died in 1973. Counsel for the respondent class moved to substitute Nancy Yamasaki as the respondent named in the caption of the case in this Court, and that motion was granted. 441 U. S. 959 (1979). In order to be consistent with the heretofore published reports of these cases, we refer to the decisions in the District Courts and Court of Appeals by their original captions.

[5] For respondents Isabelle Ortiz, Jordan Silva, and John Vaquilar, the Secretary's determination was based on annual excess earnings reports they filed. The Secretary determined that respondents Raymond Gaines and Nancy Yamasaki were overpaid because of administrative errors. *Elliott* v. *Weinberger*, 371 F. Supp., at 965–966.

notice they received was inadequate and because they were not given an opportunity for an oral hearing before recoupment began, the recoupment procedures violated both § 204 of the Act and the Fifth Amendment of the Constitution. They sought class certification, and requested both declaratory and injunctive relief that would require the Secretary to cease future recoupment until such time as he provided the class with adequate notice and opportunity for a hearing. App. 11–21.

The District Court certified a class of "all social security old age and disability benefit recipients resident in the State of Hawaii, who are being or will be subjected to adjustment of their social security benefits pursuant to 42 U. S. C. §§ 404 (a) and (b) without adequate prior notice of the grounds for such action and without a prior hearing on disputed issues relating to such actions." *Id.*, at 35. The court found jurisdiction under the mandamus statute, 28 U. S. C. § 1361, and granted relief to respondents. The court said that due process required that the Secretary provide an opportunity for an informal oral hearing before an independent decisionmaker prior to recoupment. In so holding, the court relied on *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), which determined that, under the Due Process Clause, a statutory right to welfare benefits could not be terminated without prior notice and opportunity for an evidential hearing. The court also held that the Constitution required that the initial overpayment notice be modified to inform the recipient more fully concerning recoupment procedures. Although the court did not discuss respondents' statutory claim, it granted judgment for respondents on both statutory and constitutional grounds and ordered injunctive relief for the class. *Elliott* v. *Weinberger*, 371 F. Supp. 960 (1974).

The *Buffington* Case

Relying on annual earnings reports, the Secretary determined that the individual respondents in *Buffington* had been

overpaid for previous years.[6] After receiving notice, both named respondents sought administrative relief, but were unable to halt recoupment. They then brought suit in the United States District Court for the Western District of Washington. They, too, alleged that the Secretary's recoupment procedures were contrary to both § 204 and the Due Process Clause of the Fifth Amendment. They requested certification of a nationwide class, an injunction ordering repayment of amounts unlawfully withheld, and declaratory and mandamus relief that would require the Secretary to provide notice and an opportunity for a hearing before recoupment began again. App. 188–201.

The District Court certified a nationwide class composed of "all individuals eligible for [old-age and survivors' benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court, however, excluded from the class residents of Hawaii and the Eastern District of Pennsylvania, where suits raising similar issues were known to have been brought. *Id.*, at 259. See, *e. g.*, *Mattern* v. *Weinberger*, 519 F. 2d 150 (CA3 1975). As a precautionary measure, the court also excluded all persons who had participated as plaintiffs or members of a plaintiff class in litigation against the Secretary on similar issues, if a decision on the merits previously had been rendered. App. 259–260.

The court then granted summary judgment for the class. The court found jurisdiction under the mandamus statute, 28 U. S. C. § 1361.[7] It enjoined the Secretary from ordering

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[6] Respondent Fannie Buffington received wife's benefits. Her husband filed a report which revealed that his earnings had exceeded the statutory limit. Respondent Frances Biner was asked to file an earnings report for 1972 after a check with her employer showed that her earnings exceeded those previously reported. *Elliott* v. *Weinberger*, 564 F. 2d, at 1224–1225.

[7] The District Court also asserted jurisdiction under the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* Thereafter, in *Califano* v. *Sanders*, 430 U. S. 99 (1977), however, this Court held that that Act does not

recoupment without having provided recipients with a prior opportunity for an informal hearing before an independent decisionmaker. The court also ordered that the initial notice be amended to provide more information about recoupment procedures. *Buffington* v. *Weinberger*, Civ. No. 734–73C2 (WD Wash. Oct. 22, 1974). App. 262–265.

The Court of Appeals

The United States Court of Appeals for the Ninth Circuit consolidated the two cases for disposition on appeal. In an unreported opinion, *Elliott* v. *Weinberger*, Nos. 74–1611 and 74–3118 (Oct. 1, 1975), App. to Pet. for Cert. 40A–84A, that court found that the complaints presented substantial constitutional questions and so § 1361 mandamus jurisdiction was proper. It upheld the certification of the classes under Fed. Rule Civ. Proc. 23 (b)(2), finding counsel was sufficiently skilled and experienced to represent the class. It rejected the Secretary's contention that a nationwide class should not have been certified. It found nothing in Rule 23 indicating that such a class was improper, and it believed as a practical matter that, because respondents did not seek damages, no manageability problems were present. It indicated that to require recipients to sue individually would result in an unnecessary duplication of actions, the evil that Rule 23 was designed to prevent. On the merits, the Court of Appeals, without directly addressing respondents' statutory claims, affirmed the holdings that the Secretary's recoupment procedures were unconstitutional.

Subsequent to that decision, this Court, in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), held that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability insurance benefits. We then granted petitions for writs of certiorari filed by the Secretary

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provide a grant of federal-court jurisdiction. Respondents do not rely on that statute here.

both in this case and in *Mattern, supra,* vacated the judgments below, and remanded the cases for further consideration in light of *Eldridge.* 425 U. S. 987 (1976).

On remand, the Court of Appeals adhered to the essential features of its original decision. *Elliott* v. *Weinberger,* 564 F. 2d 1219 (1977). The court reaffirmed its holding that it had jurisdiction under the mandamus statute. It noted that, while *Eldridge* had indicated that named plaintiffs would be able to assert jurisdiction based on § 205 (g) under *Weinberger* v. *Salfi,* 422 U. S. 749, 755, 764 (1975), there was some doubt as to whether that statute would provide jurisdiction for a class action seeking injunctive relief, and therefore the extraordinary remedy of mandamus could be invoked. The court found that these actions were not foreclosed by the jurisdictional limitations contained in § 205 (h), because these actions were brought to enforce constitutional rights, not "to recover on any claim" for benefits.

On the merits, the court found *Eldridge* distinguishable. One of three grounds cited in support of this conclusion is of particular relevance here. The court expressly found that the Secretary's procedures for handling waivers created an undue risk of erroneous deprivation. It said that, unlike the medical decision at issue in *Eldridge,* the grant of a waiver frequently depended on credibility, which could not be ascertained from the written submission on which the Secretary relied. The court thus held that when waiver was requested, the Due Process Clause required that the recipient be given an oral hearing before recoupment begins. The court said a prior hearing was not required, however, in § 204 (a) reconsideration cases if the dispute was a routine one centering on a computational error or a payment problem that did not demand an evaluation of credibility.[8] The court specified

[8] The United States Court of Appeals for the Third Circuit on remand reaffirmed its prior holding that the Due Process Clause required an oral hearing prior to recoupment when waiver was requested under § 204 (b),

six requirements that the oral hearing should meet, including rights to receive notice, to submit evidence, to cross-examine witnesses, to have counsel, to have an impartial hearing officer, and to receive a written decision. The court did not require that a transcript of the hearing be made. 564 F. 2d, at 1235.

The court also held that the notice must be "plainly and clearly communicated." *Ibid.* The court suggested that this could be accomplished by including in the notice such matters as the reason for overpayment, a statement of the right to request reconsideration or waiver, the forms available for that purpose, a description of the nature of reconsideration and waiver, and notice of the right to a prerecoupment hearing. *Id.*, at 1236.

The Secretary filed a petition for a writ of certiorari seeking review of both the holding that the Due Process Clause required a prerecoupment oral hearing, and the determination that the class was properly certified. The Secretary, however, did not request review of the holding that his notice of recoupment was constitutionally defective. Certiorari was granted. *Califano* v. *Elliott*, 439 U. S. 816 (1978).

III

A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question. *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 582–583, and n. 22 (1979); *United States* v. *CIO*, 335 U. S. 106, 110 (1948); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (concurring opinion). Due respect for the coordinate branches of government, as well as a reluctance when conscious of fallibility to speak with our utmost finality, see *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., con-

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but it said that no such hearing was ever required when reconsideration was requested under § 204 (a). *Mattern* v. *Mathews*, 582 F. 2d 248 (1978), cert. pending *sub nom. Califano* v. *Mattern*, No. 78–699.

curring in result), counsels against unnecessary constitutional adjudication. And if "a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided," *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932), a court should adopt that construction. In particular, this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary. See *Greene* v. *McElroy*, 360 U. S. 474, 507–508 (1959).

The District Courts and Court of Appeals in the cases now before us gave these principles somewhat short shrift in declining to pass expressly on respondents' contention that § 204 itself requires a prerecoupment oral hearing. We turn to the statute first, and find that it fairly may be read to require a prerecoupment decision by the Secretary. With respect to § 204 (a) reconsideration as to whether overpayment occurred, we agree that the statute does not require that the decision involve a prior oral hearing, and we reject respondents' contention that the Constitution does so. With respect to § 204 (b) waiver of the Secretary's right to recoup, however, because the nature of the statutory standards makes a hearing essential, we find it unnecessary to determine whether the Constitution would require a similar result.

A

On its face, § 204 requires that the Secretary make a prerecoupment waiver decision, and that the decision, like that concerning the fact of the overpayment, be accurate. In the imperative voice,[9] it says "there shall be no adjustment of

[9] A number of statutes authorizing the recovery of federal payments make an exception for cases that are "against equity and good conscience." Most are entirely permissive. They provide that recovery "is not required," *e. g.*, 10 U. S. C. §§ 1442, 1453 (serviceman's family annuity and survivors' benefit); or that an agency "may waive" recovery if a proper showing is made, 5 U. S. C. § 4108 (c) (civil service training expenses), 5 U. S. C. § 5922 (b) (2) (foreign station allowances); or that the agency

payments to, or recovery by the United States from, any person" who qualifies for waiver. See *Mattern* v. *Weinberger*, 519 F. 2d, at 166, and n. 32. Echoing this requirement, § 204 (a) says that only "proper" adjustments or recoveries are to be made. The implication is that a recoupment from a person qualifying under § 204 (b) would not be "proper."

Insofar as § 204 is read to require a prerecoupment decision, the reading is in accord with the manner in which the Secretary presently administers the statute. No recoupment is made until a preliminary waiver or reconsideration decision has taken place, either by default after the recipient has received proper notice, or by review of a written request. Claims Manual §§ 5503.2 (c), 5503.4 (b). This interpretation is also reinforced by a comparison with other sections of the

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head "shall make such provision as he finds appropriate", 42 U. S. C. § 1383 (b) (supplemental security income); or simply that recovery "may be waived," 10 U. S. C. § 2774 (a) (military pay).

In contrast, § 204 is mandatory in form. It says "there shall be no" recovery when waiver is proper. In this regard, it resembles the "equity and good conscience" waiver provisions found in only four other statutes: 38 U. S. C. § 3102 (a) (veterans' benefits); 42 U. S. C. § 1395gg (c) (Medicare); 45 U. S. C. § 231i (c) (Railroad Retirement Act of 1974); 45 U. S. C. § 352 (d) (Railroad Unemployment Insurance Act). Even those statutes are not identical to § 204 in all material respects. While the use of the word "shall," particularly with reference to an equitable decision, does not eliminate all discretion, see *Hecht Co.* v. *Bowles*, 321 U. S. 321, 327–331 (1944), it at least imposes on the Secretary a duty to decide. And here where the provision for recovery, § 204 (a), and the provision for waiver, § 204 (b), are phrased in equally mandatory terms, it is reasonable to infer that in this particular statute Congress did not intend to exalt recovery over waiver.

The legislative history of § 204 (b) indicates merely that Congress intended to make recovery more equitable by authorizing waiver. See H. R. Rep. No. 728, 76th Cong., 1st Sess., 19 (1939); Hearings on Social Security before the House Committee on Ways and Means, 76th Cong., 1st Sess., 2287–2288 (1939); S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 256 (1965); S. Rep. No. 744, 90th Cong., 1st Sess., 257 (1967).

Social Security Act. Section 204 is strikingly unlike § 225,[10] which expressly permits suspension of disability benefits before eligibility is finally decided. See *Richardson* v. *Wright*, 405 U. S. 208 (1972). On the other hand, an analogy may be drawn between § 204 and § 303 (a)(1), 42 U. S. C. § 503 (a)(1), which this Court in *California Human Resources Dept.* v. *Java*, 402 U. S. 121 (1971), interpreted to require payment of unemployment benefits pending a final determination of eligibility.[11] Neither § 204 nor § 303 (a)(1) expressly addresses the timing of a hearing, but both speak in mandatory terms and imply that the mandated act—here waiver of recoupment, there payment of benefits—is to precede other action.

B

The heart of the present dispute concerns not whether a prerecoupment decision should be made, but whether making the decision by regional office review of the written waiver request is sufficient to protect the recipient's right not to be subjected to an improper recoupment.

In this regard, requests for reconsideration under § 204 (a), as to whether overpayment occurred, may be distinguished from requests for waiver of the Secretary's right to recoup

[10] Section 225, 42 U. S. C. § 425, provides:

"If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to [disability benefits] . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits . . . until it is determined . . . whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased."

[11] Section 303 (a) provides:

"The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . includes provision for—

"(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."

under § 204 (b). As the Courts of Appeals in this case and in *Mattern* noted, requests under § 204 (a) for reconsideration involve relatively straightforward matters of computation for which written review is ordinarily an adequate means to correct prior mistakes. *Elliott*, 564 F. 2d, at 1231; *Mattern* v. *Mathews*, 582 F. 2d 248, 255–256 (CA3 1978). Many of the named respondents were found to have been overpaid based on earnings reports they themselves had submitted. But unlike the Court of Appeals in this case, we do not think that the rare instance in which a credibility dispute is relevant to a § 204 (a) claim is sufficient to require the Secretary to sift through all requests for reconsideration and grant a hearing to the few that involve credibility. The statute authorizes only "proper" recoupment, but some leeway for practical administration must be allowed. Nor do the standards of the Due Process Clause, more tolerant than the strict language here in issue, require that prerecoupment oral hearings be afforded in § 204 (a) cases. The nature of a due process hearing is shaped by the "risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U. S., at 344. It would be inconsistent with that principle to require a hearing under § 204 (a) when review of a beneficiary's written submission is an adequate means of resolving all but a few § 204 (a) disputes. *Mattern*, 582 F. 2d, at 258.

By contrast, written review hardly seems sufficient to discharge the Secretary's statutory duty to make an accurate determination of waiver under § 204 (b). Under that subsection, the Secretary must assess the absence of "fault" and determine whether or not recoupment would be "against equity and good conscience." These standards do not apply under § 204 (a). The Court previously has noted that a "broad 'fault' standard is inherently subject to factual determination and adversarial input." *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 617 (1974). As the Secretary's regulations

make clear, "fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence . . . and physical and mental condition" as well as his good faith. 20 CFR § 404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. See *Goldberg* v. *Kelly*, 397 U. S., at 269.

The consequences of the injunctions entered by the District Courts confirm the reasonableness of interpreting § 204 (b) to require a prerecoupment oral hearing. In compliance with those orders, the Secretary, beginning with calendar year 1977, has granted what respondents term "a short personal conference with an impartial employee of the Social Security Administration at which time the recipient presents testimony and evidence and cross-examines witnesses, and the administrative employee questions the recipient." Brief for Respondents 46. Of the approximately 2,000 conferences held between January 1977 and October 1978, 30% resulted in a reversal of the Secretary's decision. Brief for Petitioner 46. This rate of reversal confirms the view that, without an oral hearing, the Secretary may misjudge a number of cases that he otherwise would be able to assess properly, and that the hearing requirement imposed by the Court of Appeals significantly furthers the statutory goal that "there shall be no" recoupment when waiver is appropriate. We therefore agree with the Court of Appeals that an opportunity for a prerecoupment oral hearing is required when a recipient requests waiver under § 204 (b).

IV

Without full consideration of the question, the Court of Appeals expressed doubts about the availability of full relief

under § 205 (g), the Act's judicial review provision. It therefore invoked the extraordinary remedy of mandamus, for which jurisdiction is provided by 28 U. S. C. § 1361. In this Court, the Secretary contends that mandamus is not appropriate. And though he concedes that jurisdiction over the claims of the named plaintiffs was proper under § 205 (g), he argues that class relief is inappropriate under that section. The Secretary contends in the alternative that even if class relief were appropriate, a nationwide class should not have been certified, and, because the classes here include individuals who have not filed for reconsideration or waiver, relief was awarded to persons over whom the courts had no § 205 (g) jurisdiction. The Secretary also contends that injunctive relief cannot be awarded in a § 205 (g) suit. While we do not reject the Secretary's contentions entirely, we find that nothing in § 205 (g) prohibits the prerecoupment hearing relief awarded in this case, and so we do not reach the question whether mandamus would otherwise be available.

A

The Secretary argues that class relief is not available in connection with any action brought under § 205 (g),[12] and therefore that class relief should not have been afforded in this case. In making this argument, the Secretary relies on the language of § 205 (g) which authorizes suit by "[a]ny individual," speaks of judicial review of "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party," and empowers district courts "to enter . . . a judgment affirming, modifying, or reversing the decision of the Secretary." This language, the Secretary says, indicates

[12] In pertinent part, § 205 (g), 42 U. S. C. § 405 (g), provides:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

that Congress contemplated a case-by-case adjudication of claims under § 205 (g) that is incompatible with class relief.

The Secretary contends that the decision in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), finding class relief inappropriate on the facts of that case, and the legislative history of § 205 (g) [13] support his argument in this regard. And though the Secretary concedes that every Court of Appeals that has considered this issue has concluded that class relief is available under § 205 (g),[14] he distinguishes those cases on the grounds they evinced insufficient respect for the statute's plain language and exaggerated the need for class relief in § 205 (g) actions. Restricted judicial review will not have a detrimental effect on the administration of the Social Security Act, the Secretary says, because he will appeal adverse decisions or abide them within the jurisdiction of the courts rendering them. There is thus no need for repetitious litigation in order to establish legal principles beyond the confines of a particular case, and no need to afford class relief in cases brought under § 205 (g).

Section 205 (g) contains no express limitation of class relief. It prescribes that judicial review shall be by the usual type of "civil action" brought routinely in district court in

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[13] The Secretary, noting the sparseness of the legislative history of the Social Security Act on this issue, points only to language indicating that § 205 (g) was intended to fill a gap in the original Act. Congress indicated that it amended the Act because it did not "specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the [Social Security] Board." S. Rep. No. 734, 76th Cong., 1st Sess., 52 (1939). The reference in this passage to "a claimant" and "his claim," the Secretary believes, bolsters his argument that Congress intended only case-by-case adjudication under § 205 (g).

[14] See, *e. g.*, *Caswell* v. *Califano*, 583 F. 2d 9, 14 n. 12 (CA1 1978); *Jones* v. *Califano*, 576 F. 2d 12, 21–22 (CA2 1978); *Liberty Alliance of the Blind* v. *Califano*, 568 F. 2d 333, 344–346 (CA3 1977); *Johnson* v. *Mathews*, 539 F. 2d 1111, 1125–1126 (CA8 1976); *Jimenez* v. *Weinberger*, 523 F. 2d 689, 694–697 (CA7 1975), cert. denied *sub nom. Mathews* v. *Jimenez*, 427 U. S. 912 (1976).

connection with the array of civil litigation. Federal Rule Civ. Proc. 1, in turn, provides that the Rules "govern the procedure in the United States district courts in *all* suits of a civil nature." (Emphasis added.) Those Rules provide for class actions of the type certified in this case. Fed. Rule Civ. Proc. 23 (b)(2). In the absence of a direct expression by Congress of its intent to depart from the usual course of trying "all suits of a civil nature" under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court, including those seeking to overturn determinations of the departments of the Executive Branch of the Government in cases where judicial review of such determinations is authorized.

We do not find in § 205 (g) the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure. The fact that the statute speaks in terms of an action brought by "any individual" or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible. Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them. See, *e. g.*, 28 U. S. C. § 1343 (civil rights; provides jurisdiction over civil actions "authorized by law to be commenced by any person"); 28 U. S. C. § 1361 (mandamus; empowers federal courts to compel certain Government officials and agencies "to perform a duty owed to the plaintiff"); 29 U. S. C. § 1132 (a) (Employee Retirement Income Security Act of 1974; provides jurisdiction over a civil action brought under the Act "by a participant or beneficiary"). It is not unusual that § 205 (g), like these other jurisdictional statutes, speaks in terms of an individual plaintiff, since the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation

is conducted by and on behalf of the individual named parties only.

Moreover, class relief is consistent with the need for case-by-case adjudication emphasized by the Secretary, at least so long as the membership of the class is limited to those who meet the requirements of § 205 (g). See *Norton* v. *Mathews*, 427 U. S. 524, 535–537, and nn. 4–8 (1976) (STEVENS, J., dissenting). Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding.

Finally, we note that class relief for claims such as those presented by respondents in this case is peculiarly appropriate. The issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class. The ultimate question is whether a prerecoupment hearing is to be held, and each individual claim has little monetary value. It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.

We therefore agree that where the district court has jurisdiction over the claims of the members of the class in accordance with the requirements set out in § 205 (g), it also has the discretion under Fed. Rule Civ. Proc. 23 to certify a class action for the litigation of those claims.

B

The Secretary next argues that, assuming class actions in fact may be maintained under § 205 (g), it was error for the courts here to sustain the nationwide class in the *Buffington* litigation. He argues that a nationwide class is unwise in that it forecloses reasoned consideration of the same issues by

other federal courts and artificially increases the pressure on the docket of this Court by endowing with national importance issues that, if adjudicated in a narrower context, might not require our immediate attention. Moreover, the Secretary, citing *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977), as an example, argues that nationwide class relief is inconsistent with the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.

Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule. Since the class here was certified in accordance with Rule 23 (b)(2), the limitations on class size associated with Rule 23 (b)(3) actions do not apply directly. Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class. *Dayton Board*, 433 U. S., at 414–420. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.

We concede the force of the Secretary's contentions that nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court's docket. It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts. But we decline to adopt the extreme position that

such a class may never be certified. The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court. On the facts of this case we cannot conclude that the District Court in *Buffington* abused that discretion, especially in light of its sensitivity to ongoing litigation of the same issue in other districts, and the determination that counsel was adequate to represent the class.

C

The Secretary concedes that the named plaintiffs have satisfied the requirements of § 205 (g) jurisdiction.[15] He argues, however, that the District Courts erred in awarding relief to class members who have been subjected to recoupment but who have not sought either reconsideration of overpayment determinations or waiver of recovery. The Secretary contends that these class members have failed to obtain a "final decision" from the Secretary as required by § 205 (g), as construed in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U. S. 319 (1976).

[15] Brief for Petitioner 54–55. There are five named representatives in the *Elliott* class. The District Court found that the notice sent to respondents by the Secretary did not advise them of the need to file a written request, but that even so all had personally been in touch with the local Social Security office within 30 days and objected to recoupment. The court also found that, after suit was initiated, John Vaquilar, Evelyn Elliott, Raymond Gaines, and Nancy Yamasaki filed written requests for reconsideration and waiver, and that these requests would not have changed their status had filing been timely. 371 F. Supp., at 965, and n. 8, 966, and n. 14. The Secretary says that files of the Social Security Administration also show that Jordan Silva filed a request for reconsideration and waiver, which was denied. Brief for Petitioner 12 n. 16. Because Isabelle Ortiz never filed such a request, the Secretary expresses some reservation as to whether she has met the requirements of § 205 (g). Brief for Petitioner 55.

There are two named representatives of the *Buffington* class. Fannie Buffington filed a request for reconsideration, and Frances Biner filed a request for waiver. 564 F. 2d, at 1224–1225.

The relief to which the Secretary objects in this Court is the determination that he must afford class members an opportunity for a prerecoupment oral hearing. With respect to that relief, the classes certified were plainly too broad. Both the *Elliott* and the *Buffington* classes included persons who had not filed requests for reconsideration or waiver in the past and would not do so in the future.[16] As to them, no "final decision" concerning the right to a prerecoupment hearing has been or will be made.

The Secretary errs, however, in suggesting that the lower courts ordered that an opportunity for a prerecoupment oral hearing be afforded to those persons. The Court of Appeals aptly summarized its holding, and that of the District Courts, as being that recipients are entitled to the opportunity for a hearing "when they claim a waiver." 564 F. 2d, at 1222. Because the procedure for claiming waiver involves filing a written request with the Secretary, we cannot agree that the Court of Appeals ordered this relief for those who do not meet the jurisdictional prerequisites of § 205 (g). The Secretary's objection to the class definition is well taken, but it provides no basis for altering the relief actually granted in this case.

D

Finally, the Secretary contends that the District Courts erred in granting injunctive relief. He argues that the grant of jurisdiction found in § 205 (g), which speaks only of the

[16] Respondents also sought and obtained a ruling that the Secretary had not provided constitutionally adequate notice. The breadth of the classes is caused in part by the inclusion of all those who had not received adequate notice, a class far larger than the class of those who, after receiving notice, filed a request for reconsideration or waiver with the Secretary. The Secretary does not challenge in this Court the Court of Appeals' ruling as to notice, and none of the parties discuss whether a decision to send notice could be a "final decision" within the meaning of § 205 (g). We therefore decline to consider whether the Court of Appeals had jurisdiction under § 205 (g) to grant notice relief to the class members.

power to enter a judgment "affirming, modifying, or reversing the decision of the Secretary," does not encompass the equitable power to direct that the statute be implemented through procedures other than those authorized by the Secretary. Invoking the maxim that equitable relief is appropriate only when a party has no adequate remedy at law, he says that respondents would have an adequate remedy if a court simply reversed the Secretary's decision not to grant them prerecoupment oral hearings. In the face of such an order, he would be forced, he says, to suspend recoupment until the recipient was afforded a hearing.

The Secretary's reading of the statute is too grudging. Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946); *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, 9–11 (1942). Nothing in either the language or the legislative history [17] of § 205 (g) indicates that Congress intended to preclude injunctive relief in § 205 (g) suits.

Injunctions can play an essential role in § 205 (g) litigation. Without the power to order a stay of recoupment pending decision, a court for all practical purposes would be unable to "reverse" a decision concerning prerecoupment rights. In class actions, injunctions may be necessary to protect the interests of absent class members and to prevent repetitive litigation. While the grant of injunctive relief makes the Secretary's duty to comply enforceable by contempt order, "[s]urely Congress did not intend § 205 (g) to provide reluctant federal officials with a means of delay in the remote eventuality that they might not feel bound by the judgment of a federal court." *Norton* v. *Mathews*, 427 U. S., at 535 (dissenting opinion). The conclusion that injunctive relief

[17] See S. Rep. No. 734, 76th Cong., 1st Sess., 52 (1939); H. R. Rep. No. 728, 76th Cong., 1st Sess., 43 (1939).

is available under § 205 (g) is supported both by our implicit holding that a three-judge court was properly convened in *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974), and by the opinions of four Courts of Appeals.[18]

V

For these reasons, we hold that recipients who file a written request for waiver under § 204 (b) are entitled to the opportunity for a prerecoupment oral hearing; that those who merely request reconsideration under § 204 (a) are not so entitled; that class certification is permissible under § 205 (g); that the *Buffington* court did not abuse its discretion in certifying a nationwide class; that the class did exceed the bounds permitted by § 205 (g), but that the class members who received relief all satisfied the § 205 (g) requirement that a request for waiver be filed; and that injunctive relief may be awarded in a § 205 (g) proceeding.

The judgment of the Court of Appeals is therefore affirmed in part and reversed in part.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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[18] See *Caswell* v. *Califano*, 583 F. 2d, at 14 n. 12; *In re Letourneau*, 559 F. 2d 892, 894 (CA2 1977); *Johnson* v. *Mathews*, 539 F. 2d, at 1125–1126; *Jimenez* v. *Weinberger*, 523 F. 2d, at 694–697. See generally *Weinberger* v. *Salfi*, 422 U. S. 749, 763 n. 8 (1975), noting this issue.

FARE, ACTING CHIEF PROBATION OFFICER *v.* MICHAEL C.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 78-334. Argued February 27, 1979—Decided June 20, 1979

Respondent, at the time 16½ years old, was taken into custody by Van Nuys, Cal., police on suspicion of murder. Before being questioned at the station house, he was fully advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436. At the outset of the questioning, respondent, who was on probation to the Juvenile Court, had served a term in a youth corrections camp, and had a record of prior offenses, asked to see his probation officer. But when the police denied this request, respondent stated he would talk without consulting an attorney, and he then proceeded to make statements and draw sketches implicating him in the murder. Upon being charged in Juvenile Court with the murder, he moved to suppress the incriminating statements and sketches on the ground that they had been obtained in violation of *Miranda* in that his request to see his probation officer constituted an invocation of his Fifth Amendment right to remain silent, just as if he had requested the assistance of an attorney. The court denied the motion, holding that the facts showed that respondent had waived his right to remain silent, notwithstanding his request to see his probation officer. The California Supreme Court reversed, holding that respondent's request for his probation officer was a *per se* invocation of his Fifth Amendment rights in the same way the request for an attorney was found in *Miranda* to be, regardless of what the interrogation otherwise might reveal. This holding was based on the court's view that a probation officer occupies a position as a trusted guardian figure in a juvenile's life that would make it normal for the juvenile to turn to the officer when apprehended by the police, and was also based on the state-law requirement that the officer represent the juvenile's interests.

Held:

1. The California Supreme Court erred in finding that respondent's request for his probation officer was a *per se* invocation of his Fifth Amendment rights under *Miranda*, and therefore also erred in holding that because the police did not cease interrogating respondent the statements and sketches made during the interrogation should have been suppressed. Pp. 716–724.

(a) The rule in *Miranda* that if an accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease, was based on the unique role the lawyer plays in the adversary system of criminal justice. A probation officer is not in a position to offer the type of legal assistance necessary to protect the Fifth Amendment rights of an accused undergoing custodial interrogation that a lawyer can offer. Pp. 719–722.

(b) The fact that a relationship of trust and cooperation might exist between a probation officer and a juvenile does not indicate that the officer is capable of rendering effective legal advice sufficient to protect the juvenile's rights during police interrogation, or of providing the other services rendered by a lawyer. Similarly, the fact that the probation officer has a statutory duty to protect the juvenile's interests does not make the officer any more capable of rendering legal assistance to the juvenile or of protecting his legal rights, especially where the officer also has a statutory duty to report wrongdoing by the juvenile and serve the ends of the juvenile court system. Pp. 722–723.

(c) A juvenile's request to speak with his probation officer does not constitute a *per se* request to remain silent nor is it tantamount to a request for an attorney. Pp. 723–724.

2. Whether the incriminating statements and sketches were admissible on the basis of waiver was a question to be resolved on the totality of the circumstances surrounding the interrogation. On the basis of the record, it is clear that respondent voluntarily and knowingly waived his Fifth Amendment rights and consented to continued interrogation, and that the statements and sketches obtained from him were voluntary, and hence their admission in the Juvenile Court proceeding was correct. Pp. 724–727.

21 Cal. 3d 471, 579 P. 2d 7, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 728. POWELL, J., filed a dissenting opinion, *post*, p. 732.

Mark Alan Hart, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *S. Clark Moore*, Assistant Attorney General, and *James H. Kline* and *Shunji Asari*, Deputy Attorneys General.

Albert J. Menaster argued the cause for respondent. With him on the brief were *Wilbur F. Littlefield, Dennis A. Fischer,* and *Kenneth I. Clayman.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In *Miranda* v. *Arizona,* 384 U. S. 436 (1966), this Court established certain procedural safeguards designed to protect the rights of an accused, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimination during custodial interrogation. The Court specified, among other things, that if the accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease, and any statement obtained from him during interrogation thereafter may not be admitted against him at his trial. *Id.,* at 444–445, 473–474.

In this case, the State of California, in the person of its acting chief probation officer, attacks the conclusion of the Supreme Court of California that a juvenile's request, made while undergoing custodial interrogation, to see his *probation officer* is *per se* an invocation of the juvenile's Fifth Amendment rights as pronounced in *Miranda.*

I

Respondent Michael C. was implicated in the murder of Robert Yeager. The murder occurred during a robbery of the victim's home on January 19, 1976. A small truck registered in the name of respondent's mother was identified as having been near the Yeager home at the time of the killing, and a young man answering respondent's description was seen by witnesses near the truck and near the home shortly before Yeager was murdered.

**Fred E. Inbau, Frank G. Carrington, Wayne W. Schmidt, George Nicholson, Edwin L. Miller, Jr.,* and *Peter C. Lehman* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

On the basis of this information, Van Nuys, Cal., police took respondent into custody at approximately 6:30 p. m. on February 4. Respondent then was 16½ years old and on probation to the Juvenile Court. He had been on probation since the age of 12. Approximately one year earlier he had served a term in a youth corrections camp under the supervision of the Juvenile Court. He had a record of several previous offenses, including burglary of guns and purse snatching, stretching back over several years.

Upon respondent's arrival at the Van Nuys station house two police officers began to interrogate him. The officers and respondent were the only persons in the room during the interrogation. The conversation was tape-recorded. One of the officers initiated the interview by informing respondent that he had been brought in for questioning in relation to a murder. The officer fully advised respondent of his *Miranda* rights. The following exchange then occurred, as set out in the opinion of the California Supreme Court, *In re Michael C.*, 21 Cal. 3d 471, 473–474, 579 P. 2d 7, 8 (1978) (emphasis added by that court):

"Q. . . . Do you understand all of these rights as I have explained them to you?

"A. Yeah.

"Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?

"A. What murder? I don't know about no murder.

"Q. I'll explain to you which one it is if you want to talk to us about it.

"A. Yeah, I might talk to you.

"Q. Do you want to give up your right to have an attorney present here while we talk about it?

"A. *Can I have my probation officer here?*

"Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

"A. How I know you guys won't pull no police officer in and tell me he's an attorney?

"Q. Huh?

"A. [How I know you guys won't pull no police officer in and tell me he's an attorney?]

"Q. Your probation officer is Mr. Christiansen.

"A. Yeah.

"Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?

"A. Yeah.

"Q. Okay, will you talk to us without an attorney present?

"A. Yeah I want to talk to you."

Respondent thereupon proceeded to answer questions put to him by the officers. He made statements and drew sketches that incriminated him in the Yeager murder.

Largely on the basis of respondent's incriminating statements, probation authorities filed a petition in Juvenile Court alleging that respondent had murdered Robert Yeager, in violation of Cal. Penal Code Ann. § 187 (West Supp. 1979), and that respondent therefore should be adjudged a ward of the Juvenile Court, pursuant to Cal. Welf. & Inst. Code Ann. § 602 (West Supp. 1979).[1] App. 4–5. Respondent thereupon moved to suppress the statements and sketches he gave the police during the interrogation. He alleged that the statements had been obtained in violation of *Miranda* in that

[1] The petition also alleged that respondent had participated in an attempted armed robbery earlier on the same evening Yeager was murdered. The Juvenile Court, however, held that the evidence was insufficient to support this charge and it was dismissed. App. 6. No issue relating to this second charge is before the Court.

his request to see his probation officer at the outset of the questioning constituted an invocation of his Fifth Amendment right to remain silent, just as if he had requested the assistance of an attorney. Accordingly, respondent argued that since the interrogation did not cease until he had a chance to confer with his probation officer, the statements and sketches could not be admitted against him in the Juvenile Court proceedings. In so arguing, respondent relied by analogy on the decision in *People* v. *Burton*, 6 Cal. 3d 375, 491 P. 2d 793 (1971), where the Supreme Court of California had held that a minor's request, made during custodial interrogation, to see his parents constituted an invocation of the minor's Fifth Amendment rights.

In support of his suppression motion, respondent called his probation officer, Charles P. Christiansen, as a witness. Christiansen testified that he had instructed respondent that if at any time he had "a concern with his family," or ever had "a police contact," App. 27, he should get in touch with his probation officer immediately. The witness stated that, on a previous occasion, when respondent had had a police contact and had failed to communicate with Christiansen, the probation officer had reprimanded him. *Id.*, at 28. This testimony, respondent argued, indicated that when he asked for his probation officer, he was in fact asserting his right to remain silent in the face of further questioning.

In a ruling from the bench, the court denied the motion to suppress. *Id.*, at 41–42. It held that the question whether respondent had waived his right to remain silent was one of fact to be determined on a case-by-case basis, and that the facts of this case showed a "clear waiver" by respondent of that right. *Id.*, at 42. The court observed that the transcript of the interrogation revealed that respondent specifically had told the officers that he would talk with them, and that this waiver had come at the outset of the interrogation and not after prolonged questioning. The court noted that

respondent was a "16 and a half year old minor who has been through the court system before, has been to [probation] camp, has a probation officer, [and is not] a young, naive minor with no experience with the courts." *Ibid.* Accordingly, it found that on the facts of the case respondent had waived his Fifth Amendment rights, notwithstanding the request to see his probation officer.[2]

On appeal, the Supreme Court of California took the case by transfer from the California Court of Appeal and, by a divided vote, reversed. *In re Michael C.*, 21 Cal. 3d 471, 579 P. 2d 7 (1978). The court held that respondent's "request to see his probation officer at the commencement of interrogation negated any possible willingness on his part to discuss his case with the police [and] thereby invoked his Fifth Amendment privilege." *Id.*, at 474, 579 P. 2d, at 8. The court based this conclusion on its view that, because of the juvenile court system's emphasis on the relationship between a probation officer and the probationer, the officer was "a trusted guardian figure who exercises the authority of the state as *parens patriae* and whose duty it is to implement

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[2] The California Court of Appeal, in an opinion reported and then vacated, affirmed. *In re Michael C.*, 135 Cal. Rptr. 762 (1977). That court noted that since the Juvenile Court's findings of fact resolved against respondent his contention that the confession had been coerced from him by threats and promises, it would have to "conclude that there was a knowing and intelligent waiver of the minor's *Miranda* rights unless it can be said that the request to speak to a probation officer was in and of itself sufficient to invoke" respondent's Fifth Amendment privilege. *Id.*, at 765–766 (footnote omitted). It refused to extend the rule of *People* v. *Burton*, 6 Cal. 3d 375, 491 P. 2d 793 (1971), to include a request for a probation officer, finding it difficult to distinguish such a request from a request to see "one's football coach, music teacher or clergyman." 135 Cal. Rptr., at 766. Even if the *Burton* rule were applicable, the court held, there was sufficient evidence of an affirmative waiver of his rights by respondent to distinguish *Burton*, where the California Supreme Court had noted that there was "nothing in the way of affirmative proof that defendant did not intend to assert his privilege." 6 Cal. 3d, at 383, 491 P. 2d, at 798.

the protective and rehabilitative powers of the juvenile court." *Id.*, at 476, 579 P. 2d, at 10. As a consequence, the court found that a minor's request for his probation officer was the same as a request to see his parents during interrogation, and thus under the rule of *Burton* constituted an invocation of the minor's Fifth Amendment rights.

The fact that the probation officer also served as a peace officer, and, whenever a proceeding against a juvenile was contemplated, was charged with a duty to file a petition alleging that the minor had committed an offense, did not alter, in the court's view, the fact that the officer in the eyes of the juvenile was a trusted guardian figure to whom the minor normally would turn for help when in trouble with the police. 21 Cal. 3d, at 476, 579 P. 2d, at 10. Relying on *Burton*, the court ruled that it would unduly restrict *Miranda* to limit its reach in a case involving a minor to a request by the minor for an attorney, since it would be " 'fatuous to assume that a minor in custody will be in a position to call an attorney for assistance and it is unrealistic to attribute no significance to his call for help from the only person to whom he normally looks—a parent or guardian.' " 21 Cal. 3d, at 475–476, 579 P. 2d, at 9, quoting *People* v. *Burton*, 6 Cal. 3d, at 382, 491 P. 2d, at 797–798. The court dismissed the concern expressed by the State that a request for a probation officer could not be distinguished from a request for one's football coach, music teacher, or clergyman on the ground that the probation officer, unlike those other figures in the juvenile's life, was charged by statute to represent the interests of the juvenile. 21 Cal. 3d, at 477, 579 P. 2d, at 10.

The court accordingly held that the probation officer would act to protect the minor's Fifth Amendment rights in precisely the way an attorney would act if called for by the accused. In so holding, the court found the request for a probation officer to be a *per se* invocation of Fifth Amendment rights in the same way the request for an attorney was found

in *Miranda* to be, regardless of what the interrogation otherwise might reveal. In rejecting a totality-of-the-circumstances inquiry, the court stated:

> "Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination. Thus our question turns not on whether the [respondent] had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege. We hold that in doing so he no less invoked the protection against self-incrimination than if he asked for the presence of an attorney." *Ibid.*, 579 P. 2d, at 10–11.

See also *id.*, at 478 n. 4, 579 P. 2d, at 11 n. 4. The court went on to conclude that since the State had not met its "burden of proving that a minor who requests to see his probation officer does not intend to assert his Fifth Amendment privilege," *id.*, at 478, 579 P. 2d, at 11, the trial court should not have admitted the confessions obtained after respondent had requested his probation officer.[3]

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[3] Two justices concurred in the court's opinion and judgment. 21 Cal. 3d, at 478, 579 P. 2d, at 11. They expressed concern that a probation officer's public responsibilities would make it difficult for him to offer legal advice to a minor implicated in a crime, and that a minor advised to cooperate with the police, perhaps even to confess, justifiably could complain later "that he had been subjected to a variation of the Mutt-and-Jeff technique criticized in *Miranda:* initial interrogating by overbearing officers, then comforting by a presumably friendly and gentle peace officer in the guise of a probation officer." *Id.*, at 479, 579 P. 2d, at 12.

Two justices dissented. *Id.*, at 480, 579 P. 2d, at 12. They would have affirmed respondent's conviction on the basis of the finding of the Juvenile Court that, in light of all the circumstances surrounding the interrogation of respondent, there was sufficient affirmative proof that respondent had waived his privilege.

The dissenters pointed out that the opinion of the court was confusing in holding, on the one hand, that the request for a probation officer was

The State of California petitioned this Court for a writ of certiorari. MR. JUSTICE REHNQUIST, as Circuit Justice, stayed the execution of the mandate of the Supreme Court of California. 439 U. S. 1310 (1978). Because the California judgment extending the *per se* aspects of *Miranda* presents an important question about the reach of that case, we thereafter issued the writ. 439 U. S. 925 (1978).

II

We note at the outset that it is clear that the judgment of

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per se an invocation of the minor's Fifth Amendment rights, and, on the other, that reversal was required because the State had not carried its burden of proving that respondent, by requesting his probation officer, did not intend thereby to assert his Fifth Amendment privilege. *Ibid.*, 579 P. 2d, at 12–13.

There may well be ambiguity in this regard. See *id.*, at 477–478, 579 P. 2d, at 11. On the basis of that ambiguity, respondent argues that the California court did not establish a *per se* rule, but held only that on the facts here respondent's request to see his probation officer constituted an invocation of his Fifth Amendment rights. The decision in *People* v. *Randall*, 1 Cal. 3d 948, 464 P. 2d 114 (1970), upon which the California court relied in both *Burton* and the present case, however, indicates that the court did indeed establish a *per se* rule in this case. In *Randall*, the court stated that even though a suspect might have invoked his Fifth Amendment rights by asking for counsel or by stating he wished to remain silent, it might be possible that subsequent voluntary statements of the accused, not prompted by custodial interrogation, would be admissible if the State could show that they were the product of the voluntary decision of the accused to waive the rights he had asserted. *People* v. *Randall*, 1 Cal. 3d, at 956, and n. 7, 464 P. 2d, at 119, and n. 7.

Randall thus indicates that the *per se* language employed by the California Supreme Court in this case is compatible with the finding that the State could have negated the *per se* effect of the request for a probation officer by showing that, notwithstanding his *per se* invocation of his rights, respondent later voluntarily decided to waive those rights and volunteer statements. In light of *Randall*, and in light of the strong *per se* language used by the California Supreme Court in its opinion in this case, see, *e. g.*, 21 Cal. 3d, at 477, 579 P. 2d, at 10–11, we think that any ambiguity in that opinion must be resolved in favor of a conclusion that the court did in fact establish a *per se* rule.

the California Supreme Court rests firmly on that court's interpretation of federal law. This Court, however, has not heretofore extended the *per se* aspects of the *Miranda* safeguards beyond the scope of the holding in the *Miranda* case itself.[4] We therefore must examine the California court's decision to determine whether that court's conclusion so to extend *Miranda* is in harmony with *Miranda*'s underlying principles. For it is clear that "a State may not impose . . . greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon* v. *Hass,* 420 U. S. 714, 719 (1975) (emphasis in original). See *North Carolina* v. *Butler,* 441 U. S. 369 (1979).

The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation. 384 U. S., at 473. "Once [such] warnings have been given, the subsequent procedure is clear." *Ibid.*

> "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the

[4] Indeed, this Court has not yet held that *Miranda* applies with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings, which for certain purposes have been distinguished from formal criminal prosecutions. See *McKeiver* v. *Pennsylvania,* 403 U. S. 528, 540–541 (1971) (plurality opinion). We do not decide that issue today. In view of our disposition of this case, we assume without deciding that the *Miranda* principles were fully applicable to the present proceedings.

> individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 473–474 (footnote omitted).

Any statements obtained during custodial interrogation conducted in violation of these rules may not be admitted against the accused, at least during the State's case in chief. *Id.*, at 479. Cf. *Harris* v. *New York*, 401 U. S. 222, 224 (1971).

Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis. See *Michigan* v. *Tucker*, 417 U. S. 433, 443–446 (1974).

The California court in this case, however, significantly has extended this rule by providing that a request by a juvenile for his probation officer has the same effect as a request for an attorney. Based on the court's belief that the probation officer occupies a position as a trusted guardian figure in the minor's life that would make it normal for the minor to turn to the officer when apprehended by the police, and based as well on the state-law requirement that the officer represent the interest of the juvenile, the California decision found that consultation with a probation officer fulfilled the role for the juvenile that consultation with an attorney does in general,

acting as a " 'protective [device] . . . to dispel the compulsion inherent in custodial surroundings.' " 21 Cal. 3d, at 477, 579 P. 2d, at 10, quoting *Miranda* v. *Arizona*, 384 U. S., at 458.

The rule in *Miranda*, however, was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court. *Id.*, at 469. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *Id.*, at 470.

The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease.

A probation officer is not in the same posture with regard to either the accused or the system of justice as a whole. Often he is not trained in the law, and so is not in a position to advise the accused as to his legal rights. Neither is he a trained advocate, skilled in the representation of the interests of his client before both police and courts. He does not assume the power to act on behalf of his client by virtue of his status as adviser, nor are the communications of the accused to the probation officer shielded by the lawyer-client privilege.

Moreover, the probation officer is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. He owes an obligation to the State, notwithstanding the obligation he may also owe the juvenile under his supervision. In most cases, the probation officer is duty bound to report wrongdoing by the juvenile when it comes to his attention, even if by communication from the juvenile himself. Indeed, when this case arose, the probation officer had the responsibility for filing the petition alleging wrongdoing by the juvenile and seeking to have him taken into the custody of the Juvenile Court. It was respondent's probation officer who filed the petition against him, and it is the acting chief of probation for the State of California, a probation officer, who is petitioner in this Court today.[5]

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[5] When this case arose, a California statute provided that a proceeding in juvenile court to declare a minor a ward of the court was to be commenced by the filing of a petition by a probation officer. Cal. Welf. & Inst. Code Ann. § 650 (West 1972). This provision since has been amended to provide that most such petitions are to be filed by the prosecuting attorney. 1976 Cal. Stats., ch. 1071, § 20. Respondent argues that, whatever the status of the probation officer as a peace officer at the time this case arose, the amendment of § 650 indicates that in the future a probation officer is not to be viewed as a legal adversary of the accused juvenile. Consequently, respondent believes that any holding of this Court with regard to respondent's 1976 request for a probation officer will be mere dictum with regard to a juvenile's similar request today. Brief for Respondent 9–10, and n. 4.

We disagree. The fact that a California probation officer in 1976 was responsible for initiating a complaint is only one factor in our analysis. The fact remains that a probation officer does not fulfill the role in our system of criminal justice that an attorney does, regardless of whether he acts merely as a counselor or has significant law enforcement duties. And in California, as in many States, the other duties of a probation officer are incompatible with the view that he may act as a counselor to a juvenile accused of crime. The very California statute that imposes upon the probation officer the duty to represent the interests of the juvenile also provides: "It shall be the duty of the probation officer to prepare for

In these circumstances, it cannot be said that the probation officer is able to offer the type of independent advice that an accused would expect from a lawyer retained or assigned to assist him during questioning. Indeed, the probation officer's duty to his employer in many, if not most, cases would conflict sharply with the interests of the juvenile. For where an attorney might well advise his client to remain silent in the face of interrogation by the police, and in doing so would be "exercising [his] good professional judgment . . . to protect to the extent of his ability the rights of his client," *Miranda* v. *Arizona*, 384 U. S., at 480–481, a probation officer would be bound to advise his charge to cooperate with the police. The justices who concurred in the opinion of the California Supreme Court in this case aptly noted: "Where a conflict between the minor and the law arises, the probation officer can be neither neutral nor in the minor's corner." 21 Cal. 3d, at 479, 579 P. 2d, at 12. It thus is doubtful that a general rule can be established that a juvenile, in every case, looks to his probation officer as a "trusted guardian figure" rather than as an officer of the court system that imposes punishment.

By the same token, a lawyer is able to protect his client's rights by learning the extent, if any, of the client's involvement in the crime under investigation, and advising his client ac-

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every hearing [of criminal charges against a juvenile] a social study of the minor, containing such matters as may be relevant to a proper disposition of the case." Cal. Welf. & Inst. Code Ann. § 280 (West Supp. 1979).

Similarly, a probation officer is required, upon the order of the juvenile court or the Youth Authority, to investigate the circumstances surrounding the charge against the minor and to file written reports and recommendations. §§ 281, 284. And a probation officer in California continues to have the powers and authority of a peace officer in connection with any violation of a criminal statute that is discovered by the probation officer in the course of his probation activities. § 283; Cal. Penal Code Ann. § 830.5 (West 1970). The duties of a peace officer, like the investigative and reporting duties of probation officers, are incompatible with the role of legal adviser to a juvenile accused of crime.

cordingly. To facilitate this, the law rightly protects the communications between client and attorney from discovery. We doubt, however, that similar protection will be afforded the communications between the probation officer and the minor. Indeed, we doubt that a probation officer, consistent with his responsibilities to the public and his profession, could withhold from the police or the courts facts made known to him by the juvenile implicating the juvenile in the crime under investigation.

We thus believe it clear that the probation officer is not in a position to offer the type of legal assistance necessary to protect the Fifth Amendment rights of an accused undergoing custodial interrogation that a lawyer can offer. The Court in *Miranda* recognized that "the attorney plays a vital role in the administration of criminal justice under our Constitution." 384 U. S., at 481. It is this pivotal role of legal counsel that justifies the *per se* rule established in *Miranda*, and that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend. A probation officer simply is not necessary, in the way an attorney is, for the protection of the legal rights of the accused, juvenile or adult. He is significantly handicapped by the position he occupies in the juvenile system from serving as an effective protector of the rights of a juvenile suspected of a crime.

The California Supreme Court, however, found that the close relationship between juveniles and their probation officers compelled the conclusion that a probation officer, for purposes of *Miranda*, was sufficiently like a lawyer to justify extension of the *per se* rule. 21 Cal. 3d, at 476, 579 P. 2d, at 10. The fact that a relationship of trust and cooperation between a probation officer and a juvenile might exist, however, does not indicate that the probation officer is capable of rendering effective legal advice sufficient to protect the juvenile's rights during interrogation by the police, or of providing the other services rendered by a lawyer. To find otherwise

would be "an extension of the *Miranda* requirements [that] would cut this Court's holding in that case completely loose from its own explicitly stated rationale." *Beckwith* v. *United States,* 425 U. S. 341, 345 (1976). Such an extension would impose the burdens associated with the rule of *Miranda* on the juvenile justice system and the police without serving the interests that rule was designed simultaneously to protect. If it were otherwise, a juvenile's request for almost anyone he considered trustworthy enough to give him reliable advice would trigger the rigid rule of *Miranda.*

Similarly, the fact that the State has created a statutory duty on the part of the probation officer to protect the interests of the juvenile does not render the probation officer any more capable of rendering legal assistance to the juvenile or of protecting his legal rights, especially in light of the fact that the State has also legislated a duty on the part of the officer to report wrongdoing by the juvenile and serve the ends of the juvenile court system. The State cannot transmute the relationship between probation officer and juvenile offender into the type of relationship between attorney and client that was essential to the holding of *Miranda* simply by legislating an amorphous "duty to advise and care for the juvenile defendant." 21 Cal. 3d, at 477, 579 P. 2d, at 10. Though such a statutory duty might serve to distinguish to some degree the probation officer from the coach and the clergyman, it does not justify the extension of *Miranda* to requests to see probation officers. If it did, the State could expand the class of persons covered by the *Miranda per se* rule simply by creating a duty to care for the juvenile on the part of other persons, regardless of whether the logic of *Miranda* would justify that extension.

Nor do we believe that a request by a juvenile to speak with his probation officer constitutes a *per se* request to remain silent. As indicated, since a probation officer does not fulfill the important role in protecting the rights of the ac-

cused juvenile that an attorney plays, we decline to find that the request for the probation officer is tantamount to the request for an attorney. And there is nothing inherent in the request for a probation officer that requires us to find that a juvenile's request to see one necessarily constitutes an expression of the juvenile's right to remain silent. As discussed below, courts may take into account such a request in evaluating whether a juvenile in fact had waived his Fifth Amendment rights before confessing. But in other circumstances such a request might well be consistent with a desire to speak with the police. In the absence of further evidence that the minor intended in the circumstances to invoke his Fifth Amendment rights by such a request, we decline to attach such overwhelming significance to this request.

We hold, therefore, that it was error to find that the request by respondent to speak with his probation officer *per se* constituted an invocation of respondent's Fifth Amendment right to be free from compelled self-incrimination. It therefore was also error to hold that because the police did not then cease interrogating respondent the statements he made during interrogation should have been suppressed.

III

Miranda further recognized that after the required warnings are given the accused, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U. S., at 475. We noted in *North Carolina* v. *Butler*, 441 U. S., at 373, that the question whether the accused waived his rights "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." Thus, the determination whether statements obtained during custodial

interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. *Miranda* v. *Arizona*, 384 U. S., at 475–477.

This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. See *North Carolina* v. *Butler, supra.*

Courts repeatedly must deal with these issues of waiver with regard to a broad variety of constitutional rights. There is no reason to assume that such courts—especially juvenile courts, with their special expertise in this area—will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives

his Fifth Amendment rights and voluntarily consents to interrogation.

In this case, we conclude that the California Supreme Court should have determined the issue of waiver on the basis of all the circumstances surrounding the interrogation of respondent. The Juvenile Court found that under this approach, respondent in fact had waived his Fifth Amendment rights and consented to interrogation by the police after his request to see his probation officer was denied. Given its view of the case, of course, the California Supreme Court did not consider this issue, though it did hold that the State had failed to prove that, notwithstanding respondent's request to see his probation officer, respondent had not intended to invoke his Fifth Amendment rights.

We feel that the conclusion of the Juvenile Court was correct. The transcript of the interrogation reveals that the police officers conducting the interrogation took care to ensure that respondent understood his rights. They fully explained to respondent that he was being questioned in connection with a murder. They then informed him of all the rights delineated in *Miranda*, and ascertained that respondent understood those rights. There is no indication in the record that respondent failed to understand what the officers told him. Moreover, after his request to see his probation officer had been denied, and after the police officer once more had explained his rights to him, respondent clearly expressed his willingness to waive his rights and continue the interrogation.

Further, no special factors indicate that respondent was unable to understand the nature of his actions. He was a 16½-year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not

worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit.

On these facts, we think it clear that respondent voluntarily and knowingly waived his Fifth Amendment rights. Respondent argues, however, that any statements he made during interrogation were coerced. Specifically, respondent alleges that the police made threats and promises during the interrogation to pressure him into cooperating in the hope of obtaining leniency for his cooperative attitude. He notes also that he repeatedly told the officers during his interrogation that he wished to stop answering their questions, but that the officers ignored his pleas. He argues further that the record reveals that he was afraid that the police would coerce him, and that this fear caused him to cooperate. He points out that at one point the transcript revealed that he wept during the interrogation.

Review of the entire transcript reveals that respondent's claims of coercion are without merit. As noted, the police took care to inform respondent of his rights and to ensure that he understood them. The officers did not intimidate or threaten respondent in any way. Their questioning was restrained and free from the abuses that so concerned the Court in *Miranda*. See 384 U. S., at 445–455. The police did indeed indicate that a cooperative attitude would be to respondent's benefit, but their remarks in this regard were far from threatening or coercive. And respondent's allegation that he repeatedly asked that the interrogation cease goes too far: at some points he did state that he did not know the answer to a question put to him or that he could not, or would not, answer the question, but these statements were not assertions of his right to remain silent.

IV

We hold, in short, that the California Supreme Court erred in finding that a juvenile's request for his probation officer was a *per se* invocation of that juvenile's Fifth Amendment

rights under *Miranda*. We conclude, rather, that whether the statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, but who has not asked to consult an attorney or expressly asserted his right to remain silent, are admissible on the basis of waiver remains a question to be resolved on the totality of the circumstances surrounding the interrogation. On the basis of the record in this case, we hold that the Juvenile Court's findings that respondent voluntarily and knowingly waived his rights and consented to continued interrogation, and that the statements obtained from him were voluntary, were proper, and that the admission of those statements in the proceeding against respondent in Juvenile Court was correct.

The judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting.

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court sought to ensure that the inherently coercive pressures of custodial interrogation would not vitiate a suspect's privilege against self-incrimination. Noting that these pressures "can operate very quickly to overbear the will of one merely made aware of his privilege," *id.*, at 469, the Court held:

> "If [a suspect in custody] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interro-

> gation must cease until an attorney is present." *Id.*, at 473–474 (footnote omitted).

See also *id.*, at 444–445.

As this Court has consistently recognized, the coerciveness of the custodial setting is of heightened concern where, as here, a juvenile is under investigation. In *Haley* v. *Ohio*, 332 U. S. 596 (1948), the plurality reasoned that because a 15½-year-old minor was particularly susceptible to overbearing interrogation tactics, the voluntariness of his confession could not "be judged by the more exacting standards of maturity." *Id.*, at 599. The Court reiterated this point in *Gallegos* v. *Colorado*, 370 U. S. 49, 54 (1962), observing that a 14-year-old suspect could not "be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." The juvenile defendant, in the Court's view, required

> "the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not." *Ibid.*

And, in *In re Gault*, 387 U. S. 1, 55 (1967), the Court admonished that "the greatest care must be taken to assure that [a minor's] admission was voluntary."

It is therefore critical in the present context that we construe *Miranda*'s prophylactic requirements broadly to accomplish their intended purpose—"dispel[ling] the compulsion inherent in custodial surroundings." 384 U. S., at 458. To effectuate this purpose, the Court must ensure that the "protective device" of legal counsel, *id.*, at 465–466, 469, be readily available, and that any intimation of a desire to preclude questioning be scrupulously honored. Thus, I believe *Miranda* requires that interrogation cease whenever a juvenile requests an adult who is obligated to represent his interests. Such a

request, in my judgment, constitutes both an attempt to obtain advice and a general invocation of the right to silence. For, as the California Supreme Court recognized, " '[i]t is fatuous to assume that a minor in custody will be in a position to call an attorney for assistance,' " 21 Cal. 3d 471, 475–476, 579 P. 2d 7, 9 (1978), quoting *People* v. *Burton*, 6 Cal. 3d 375, 382, 491 P. 2d 793, 797 (1971), or that he will trust the police to obtain a lawyer for him.[1] A juvenile in these circumstances will likely turn to his parents, or another adult responsible for his welfare, as the only means of securing legal counsel. Moreover, a request for such adult assistance is surely inconsistent with a present desire to speak freely. Requiring a strict verbal formula to invoke the protections of *Miranda* would "protect the knowledgeable accused from stationhouse coercion while abandoning the young person who knows no more than to ask for the . . . person he trusts." *Chaney* v. *Wainwright*, 561 F. 2d 1129, 1134 (CA5 1977) (Goldberg, J., dissenting).

On my reading of *Miranda*, a California juvenile's request for his probation officer should be treated as a *per se* assertion of Fifth Amendment rights. The California Supreme Court determined that probation officers have a statutory duty to represent minors' interests and, indeed, are "trusted guardian figure[s]" to whom a juvenile would likely turn for assistance. 21 Cal. 3d, at 476, 579 P. 2d, at 10. In addition, the court found, probation officers are particularly well suited to assist a juvenile "on such matters as to whether or not he should obtain an attorney" and "how to conduct himself with police." *Id.*, at 476, 477, 579 P. 2d, at 10. Hence, a juvenile's request

[1] The facts of the instant case are illustrative. When the police offered to obtain an attorney for respondent, he replied: "How I know you guys won't pull no police officer in and tell me he's an attorney?" *Ante*, at 710. Significantly, the police made no attempt to allay that concern. See 21 Cal. 3d, at 476 n. 3, 579 P. 2d, at 10 n. 3.

for a probation officer may frequently be an attempt to secure protection from the coercive aspects of custodial questioning.[2]

This Court concludes, however, that because a probation officer has law enforcement duties, juveniles generally would not call upon him to represent their interests, and if they did, would not be well served. *Ante*, at 721–722. But that conclusion ignores the California Supreme Court's express determination that the officer's responsibility to initiate juvenile proceedings did not negate his function as personal adviser to his wards.[3] I decline to second-guess that court's assessment of state law. See *Murdock* v. *Memphis*, 20 Wall. 590, 626 (1875); *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335, 337 (1944); *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 210 (1960).[4] Further, although the majority here spec-

[2] The Court intimates that construing a request for a probation officer as an invocation of the Fifth Amendment privilege would undermine the specificity of *Miranda*'s prophylactic rules. *Ante*, at 718. Yet the Court concedes that the statutory duty to "advise and care for the juvenile defendant," 21 Cal. 3d, at 477, 579 P. 2d, at 10, distinguishes probation officers from other adults, such as coaches and clergymen. *Ante*, at 723. Since law enforcement officials should be on notice of such legal relationships, they would presumably have no difficulty determining whether a suspect has asserted his Fifth Amendment rights.

Although I agree with my Brother POWELL that, on the facts here, respondent was not "subjected to a fair interrogation free from inherently coercive circumstances," *post*, at 734, I do not believe a case-by-case approach provides police sufficient guidance, or affords juveniles adequate protection.

[3] In filing the petition and performing the other functions enumerated *ante*, at 720–721, n. 5, the probation officer must act in the best interests of the minor. See *In re Steven C.*, 9 Cal. App. 3d 255, 264–265, 88 Cal. Rptr. 97, 101–102 (1970).

[4] One thing is certain. The California Supreme Court is more familiar with the duties and performance of its probation officers than we are.

Of course, "[i]t is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum." *Oregon* v. *Hass*, 420 U. S. 714, 728 (1975) (MARSHALL, J., dissenting). See also *People* v. *Disbrow*, 16 Cal. 3d 101, 545 P. 2d 272

ulates that probation officers have a duty to advise cooperation with the police, *ante*, at 721—a proposition suggested only in the concurring opinion of two justices below, 21 Cal. 3d, at 479, 579 P. 2d, at 11–12 (Mosk, J., joined by Bird, C. J., concurring)—respondent's probation officer instructed all his charges "not to go and admit openly to an offense, [but rather] to get some type of advice from . . . parents or a lawyer." App. 30. Absent an explicit statutory provision or judicial holding, the officer's assessment of the obligations imposed by state law is entitled to deference by this Court.

Thus, given the role of probation officers under California law, a juvenile's request to see his officer may reflect a desire for precisely the kind of assistance *Miranda* guarantees an accused before he waives his Fifth Amendment rights. At the very least, such a request signals a desire to remain silent until contact with the officer is made. Because the Court's contrary determination withdraws the safeguards of *Miranda* from those most in need of protection, I respectfully dissent.

MR. JUSTICE POWELL, dissenting.

Although I agree with the Court that the Supreme Court of California misconstrued *Miranda* v. *Arizona*, 384 U. S. 436 (1966),[1] I would not reverse the California court's judgment. This Court repeatedly has recognized that "the greatest care" must be taken to assure that an alleged confession of a juvenile was voluntary. See, *e. g.*, *In re Gault*, 387 U. S. 1, 55

(1976) (refusing to follow *Harris* v. *New York*, 401 U. S. 222 (1971)); Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

[1] The California Supreme Court, purporting to apply *Miranda* v. *Arizona*, stated:

"Here . . . we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination." 21 Cal. 3d 471, 477, 579 P. 2d 7, 10 (1978). I agree with the Court's opinion today that *Miranda* cannot be read as support for any such *per se* rule.

(1967); *Gallegos* v. *Colorado*, 370 U. S. 49, 54 (1962); *Haley* v. *Ohio*, 332 U. S. 596, 599–600 (1948) (plurality opinion). Respondent was a young person, 16 years old at the time of his arrest and the subsequent prolonged interrogation at the station house. Although respondent had had prior brushes with the law, and was under supervision by a probation officer, the taped transcript of his interrogation—as well as his testimony at the suppression hearing—demonstrates that he was immature, emotional,[2] and uneducated, and therefore was likely to be vulnerable to the skillful, two-on-one, repetitive style of interrogation to which he was subjected. App. 54–82.

When given *Miranda* warnings and asked whether he desired an attorney, respondent requested permission to "have my probation officer here," a request that was refused. *Id.*, at 55. That officer testified later that he had communicated frequently with respondent, that respondent had serious and "extensive" family problems, and that the officer had instructed respondent to call him immediately "at any time he has a police contact, even if they stop him and talk to him on the street." *Id.*, at 26–31.[3] The reasons given by the probation officer for having so instructed his charge were substantially the same reasons that prompt this Court to examine with special care the circumstances under which a minor's alleged confession was obtained. After stating that respondent had been "going through problems," the officer observed that "many times the kids don't understand what is going on, and what they are supposed to do relative to police . . . ." *Id.*, at 29. This view of the limited understanding of the average 16-year-old was borne out by respondent's question when,

[2] The Juvenile Court Judge observed that he had "heard the tapes" of the interrogation, and was "aware of the fact that Michael [respondent] was crying at the time he talked to the police officers." App. 53.

[3] The Supreme Court of California stated that a "probation officer is an official appointed pursuant to legislative enactment 'to represent the interests' of the juvenile [and] . . . has borne the duty to advise and care for the juvenile defendant." 21 Cal. 3d, at 477, 579 P. 2d, at 10.

during interrogation, he was advised of his right to an attorney: "How I know you guys won't pull no police officer in and tell me he's an attorney?" *Id.*, at 55. It was during this part of the interrogation that the police had denied respondent's request to "have my probation officer here." *Ibid.*

The police then proceeded, despite respondent's repeated denial of any connection to the murder under investigation, see *id.*, at 56–60, persistently to press interrogation until they extracted a confession. In *In re Gault*, in addressing police interrogation of detained juveniles, the Court stated:

> "If counsel was not present for some permissible reason when an admission was obtained [from a child], the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." 387 U. S., at 55.

It is clear that the interrogating police did not exercise "the greatest care" to assure that respondent's "admission was voluntary." [4] In the absence of counsel, and having refused to call the probation officer, they nevertheless engaged in protracted interrogation.

Although I view the case as close, I am not satisfied that this particular 16-year-old boy, in this particular situation, was subjected to a fair interrogation free from inherently coercive circumstances. For these reasons, I would affirm the judgment of the Supreme Court of California.

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[4] Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully "street-wise," hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in *In re Gault*, 387 U. S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have.

SMITH *v.* MARYLAND

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 78–5374. Argued March 28, 1979—Decided June 20, 1979

The telephone company, at police request, installed at its central offices a pen register to record the numbers dialed from the telephone at petitioner's home. Prior to his robbery trial, petitioner moved to suppress "all fruits derived from" the pen register. The Maryland trial court denied this motion, holding that the warrantless installation of the pen register did not violate the Fourth Amendment. Petitioner was convicted, and the Maryland Court of Appeals affirmed.

Held: The installation and use of the pen register was not a "search" within the meaning of the Fourth Amendment, and hence no warrant was required. Pp. 739–746.

(a) Application of the Fourth Amendment depends on whether the person invoking its protection can claim a "legitimate expectation of privacy" that has been invaded by government action. This inquiry normally embraces two questions: first, whether the individual has exhibited an actual (subjective) expectation of privacy; and second, whether his expectation is one that society is prepared to recognize as "reasonable." *Katz* v. *United States*, 389 U. S. 347. Pp. 739–741.

(b) Petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and even if he did, his expectation was not "legitimate." First, it is doubtful that telephone users in general have any expectation of privacy regarding the numbers they dial, since they typically know that they must convey phone numbers to the telephone company and that the company has facilities for recording this information and does in fact record it for various legitimate business purposes. And petitioner did not demonstrate an expectation of privacy merely by using his home phone rather than some other phone, since his conduct, although perhaps calculated to keep the *contents* of his conversation private, was not calculated to preserve the privacy of the number he dialed. Second, even if petitioner did harbor some subjective expectation of privacy, this expectation was not one that society is prepared to recognize as "reasonable." When petitioner voluntarily conveyed numerical information to the phone company and "exposed" that information to its equipment in the normal course of business, he assumed the risk that the company would reveal the infor-

mation to the police, cf. *United States* v. *Miller*, 425 U. S. 435. Pp. 741–746.

283 Md. 156, 389 A. 2d 858, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., *post*, p. 746, and MARSHALL, J., *post*, p. 748, filed dissenting opinions, in which BRENNAN, J., joined. POWELL, J., took no part in the consideration or decision of the case.

Howard L. Cardin argued the cause for petitioner. With him on the brief was *James J. Gitomer*.

Stephen H. Sachs, Attorney General of Maryland, argued the cause for respondent. With him on the brief were *George A. Nilson*, Deputy Attorney General, and *Deborah K. Handel* and *Stephen B. Caplis*, Assistant Attorneys General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether the installation and use of a pen register [1] constitutes a "search" within the meaning of the Fourth Amendment,[2] made applicable to the States through the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

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[1] "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *United States* v. *New York Tel. Co.*, 434 U. S. 159, 161 n. 1 (1977). A pen register is "usually installed at a central telephone facility [and] records on a paper tape all numbers dialed from [the] line" to which it is attached. *United States* v. *Giordano*, 416 U. S. 505, 549 n. 1 (1974) (opinion concurring in part and dissenting in part). See also *United States* v. *New York Tel. Co.*, 434 U. S., at 162.

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const., Amdt. 4.

I

On March 5, 1976, in Baltimore, Md., Patricia McDonough was robbed. She gave the police a description of the robber and of a 1975 Monte Carlo automobile she had observed near the scene of the crime. Tr. 66–68. After the robbery, McDonough began receiving threatening and obscene phone calls from a man identifying himself as the robber. On one occasion, the caller asked that she step out on her front porch; she did so, and saw the 1975 Monte Carlo she had earlier described to police moving slowly past her home. *Id.*, at 70. On March 16, police spotted a man who met McDonough's description driving a 1975 Monte Carlo in her neighborhood. *Id.*, at 71–72. By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith. *Id.*, at 72.

The next day, the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner's home. *Id.*, at 73, 75. The police did not get a warrant or court order before having the pen register installed. The register revealed that on March 17 a call was placed from petitioner's home to McDonough's phone. *Id.*, at 74. On the basis of this and other evidence, the police obtained a warrant to search petitioner's residence. *Id.*, at 75. The search revealed that a page in petitioner's phone book was turned down to the name and number of Patricia McDonough; the phone book was seized. *Ibid.* Petitioner was arrested, and a six-man lineup was held on March 19. McDonough identified petitioner as the man who had robbed her. *Id.*, at 70–71.

Petitioner was indicted in the Criminal Court of Baltimore for robbery. By pretrial motion, he sought to suppress "all fruits derived from the pen register" on the ground that the police had failed to secure a warrant prior to its installation. Record 14; Tr. 54–56. The trial court denied the suppression motion, holding that the warrantless installation of the pen

register did not violate the Fourth Amendment. *Id.*, at 63. Petitioner then waived a jury, and the case was submitted to the court on an agreed statement of facts. *Id.*, at 65–66. The pen register tape (evidencing the fact that a phone call had been made from petitioner's phone to McDonough's phone) and the phone book seized in the search of petitioner's residence were admitted into evidence against him. *Id.*, at 74–76. Petitioner was convicted, *id.*, at 78, and was sentenced to six years. He appealed to the Maryland Court of Special Appeals, but the Court of Appeals of Maryland issued a writ of certiorari to the intermediate court in advance of its decision in order to consider whether the pen register evidence had been properly admitted at petitioner's trial. 283 Md. 156, 160, 389 A. 2d 858, 860 (1978).

The Court of Appeals affirmed the judgment of conviction, holding that "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendment is implicated by the use of a pen register installed at the central offices of the telephone company." *Id.*, at 173, 389 A. 2d, at 867. Because there was no "search," the court concluded, no warrant was needed. Three judges dissented, expressing the view that individuals do have a legitimate expectation of privacy regarding the phone numbers they dial from their homes; that the installation of a pen register thus constitutes a "search"; and that, in the absence of exigent circumstances, the failure of police to secure a warrant mandated that the pen register evidence here be excluded. *Id.*, at 174, 178, 389 A. 2d, at 868, 870. Certiorari was granted in order to resolve indications of conflict in the decided cases as to the restrictions imposed by the Fourth Amendment on the use of pen registers.[3] 439 U. S. 1001 (1978).

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[3] See *Application of United States for Order*, 546 F. 2d 243, 245 (CA8 1976), cert. denied *sub nom. Southwestern Bell Tel. Co.* v. *United States*, 434 U. S. 1008 (1978); *Application of United States in Matter of Order*,

II

A

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular form of government-initiated electronic surveillance is a "search" within the meaning of the Fourth Amendment,[4] our lodestar is *Katz* v. *United States*, 389 U. S. 347 (1967). In *Katz*, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a "search" can occur only when there has been a "physical intrusion" into a "constitutionally protected area," noting that the Fourth Amendment "protects people, not places." *Id.*, at 351–353. Because the Government's monitoring of Katz' conversation "violated the privacy upon which he justifiably relied while using the telephone booth," the Court held that

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538 F. 2d 956, 959–960 (CA2 1976), rev'd on other grounds *sub nom. United States* v. *New York Tel. Co.*, 434 U. S. 159 (1977); *United States* v. *Falcone*, 505 F. 2d 478, 482, and n. 21 (CA3 1974), cert. denied, 420 U. S. 955 (1975); *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 256 (CA9 1977); *id.*, at 266 (concurring opinion); and *United States* v. *Clegg*, 509 F. 2d 605, 610 (CA5 1975). In previous decisions, this Court has not found it necessary to consider whether "pen register surveillance [is] subject to the requirements of the Fourth Amendment." *United States* v. *New York Tel. Co.*, 434 U. S., at 165 n. 7. See *United States* v. *Giordano*, 416 U. S., at 554 n. 4 (opinion concurring in part and dissenting in part).

[4] In this case, the pen register was installed, and the numbers dialed were recorded, by the telephone company. Tr. 73–74. The telephone company, however, acted at police request. *Id.*, at 73, 75. In view of this, respondent appears to concede that the company is to be deemed an "agent" of the police for purposes of this case, so as to render the installation and use of the pen register "state action" under the Fourth and Fourteenth Amendments. We may assume that "state action" was present here.

it "constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*, at 353.

Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. *E. g.*, *Rakas* v. *Illinois*, 439 U. S. 128, 143, and n. 12 (1978); *id.*, at 150, 151 (concurring opinion); *id.*, at 164 (dissenting opinion); *United States* v. *Chadwick*, 433 U. S. 1, 7 (1977); *United States* v. *Miller*, 425 U. S. 435, 442 (1976); *United States* v. *Dionisio*, 410 U. S. 1, 14 (1973); *Couch* v. *United States*, 409 U. S. 322, 335–336 (1973); *United States* v. *White*, 401 U. S. 745, 752 (1971) (plurality opinion); *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968); *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968). This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U. S., at 361—whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *id.*, at 361—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.*, at 353.[5] See *Rakas* v. *Illinois*, 439 U. S.,

[5] Situations can be imagined, of course, in which *Katz*' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding

at 143–144, n. 12; *id.*, at 151 (concurring opinion); *United States* v. *White*, 401 U. S., at 752 (plurality opinion).

B

In applying the *Katz* analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged. The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area." Petitioner's claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in *Katz*, infringed a "legitimate expectation of privacy" that petitioner held. Yet a pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications. This Court recently noted:

> "Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers." *United States* v. *New York Tel. Co.*, 434 U. S. 159, 167 (1977).

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the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.

Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constituted a "search" necessarily rests upon a claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone.

This claim must be rejected. First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law." *United States* v. *New York Tel. Co.*, 434 U. S., at 174–175. Electronic equipment is used not only to keep billing records of toll calls, but also "to keep a record of all calls dialed from a telephone which is subject to a special rate structure." *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 266 (CA9 1977) (concurring opinion). Pen registers are regularly employed "to determine whether a home phone is being used to conduct a business, to check for a defective dial, or to check for overbilling." Note, The Legal Constraints upon the Use of the Pen Register as a Law Enforcement Tool, 60 Cornell L. Rev. 1028, 1029 (1975) (footnotes omitted). Although most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls. See, *e. g.*, *Von Lusch* v. *C & P Telephone Co.*, 457 F. Supp. 814, 816 (Md. 1978); Note, 60 Cornell L. Rev., at 1029–1030, n. 11; Claerhout, The Pen Register, 20 Drake L. Rev. 108, 110–111 (1970). Most phone books tell

subscribers, on a page entitled "Consumer Information," that the company "can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls." *E. g.*, Baltimore Telephone Directory 21 (1978); District of Columbia Telephone Directory 13 (1978). Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

Petitioner argues, however, that, whatever the expectations of telephone users in general, he demonstrated an expectation of privacy by his own conduct here, since he "us[ed] the telephone *in his house* to the exclusion of all others." Brief for Petitioner 6 (emphasis added). But the site of the call is immaterial for purposes of analysis in this case. Although petitioner's conduct may have been calculated to keep the *contents* of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, nor could any subscriber rationally think that it would.

Second, even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not "one that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S., at 361. This Court consistently has held that a person has no legitimate expectation of privacy in information he

voluntarily turns over to third parties. *E. g., United States* v. *Miller,* 425 U. S., at 442–444; *Couch* v. *United States,* 409 U. S., at 335–336; *United States* v. *White,* 401 U. S., at 752 (plurality opinion); *Hoffa* v. *United States,* 385 U. S. 293, 302 (1966); *Lopez* v. *United States,* 373 U. S. 427 (1963). In *Miller,* for example, the Court held that a bank depositor has no "legitimate 'expectation of privacy' " in financial information "voluntarily conveyed to . . . banks and exposed to their employees in the ordinary course of business." 425 U. S., at 442. The Court explained:

> "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.,* at 443.

Because the depositor "assumed the risk" of disclosure, the Court held that it would be unreasonable for him to expect his financial records to remain private.

This analysis dictates that petitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. Tr. of Oral Arg. 3–5, 11–12, 32. We

are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.

Petitioner argues, however, that automatic switching equipment differs from a live operator in one pertinent respect. An operator, in theory at least, is capable of remembering every number that is conveyed to him by callers. Electronic equipment, by contrast, can "remember" only those numbers it is programmed to record, and telephone companies, in view of their present billing practices, usually do not record local calls. Since petitioner, in calling McDonough, was making a local call, his expectation of privacy as to her number, on this theory, would be "legitimate."

This argument does not withstand scrutiny. The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police. Under petitioner's theory, Fourth Amendment protection would exist, or not, depending on how the telephone company chose to define local-dialing zones, and depending on how it chose to bill its customers for local calls. Calls placed across town, or dialed directly, would be protected; calls placed across the river, or dialed with operator assistance, might not be. We are not inclined to make a crazy quilt of the Fourth Amendment, especially in circumstances where (as here) the pattern of protection would be dictated by billing practices of a private corporation.

We therefore conclude that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not "legitimate." The installation and use of a pen reg-

ister, consequently, was not a "search," and no warrant was required. The judgment of the Maryland Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

I am not persuaded that the numbers dialed from a private telephone fall outside the constitutional protection of the Fourth and Fourteenth Amendments.

In *Katz* v. *United States*, 389 U. S. 347, 352, the Court acknowledged the "vital role that the public telephone has come to play in private communication[s]." The role played by a private telephone is even more vital, and since *Katz* it has been abundantly clear that telephone conversations carried on by people in their homes or offices are fully protected by the Fourth and Fourteenth Amendments. As the Court said in *United States* v. *United States District Court*, 407 U. S. 297, 313, "the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards." (Footnote omitted.)

Nevertheless, the Court today says that those safeguards do not extend to the numbers dialed from a private telephone, apparently because when a caller dials a number the digits may be recorded by the telephone company for billing purposes. But that observation no more than describes the basic nature of telephone calls. A telephone call simply cannot be made without the use of telephone company property and without payment to the company for the service. The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment. Yet we

have squarely held that the user of even a public telephone is entitled "to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz* v. *United States, supra,* at 352.

The central question in this case is whether a person who makes telephone calls from his home is entitled to make a similar assumption about the numbers he dials. What the telephone company does or might do with those numbers is no more relevant to this inquiry than it would be in a case involving the conversation itself. It is simply not enough to say, after *Katz,* that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police.

I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in *Katz.*[1] It seems clear to me that information obtained by pen register surveillance of a private telephone is information in which the telephone subscriber has a legitimate expectation of privacy.[2] The information captured by such surveillance emanates from private conduct within a person's home or office—locations that without question are entitled to Fourth and Fourteenth Amendment protection. Further, that information is an integral part of the telephonic communication that under *Katz*

[1] It is true, as the Court pointed out in *United States* v. *New York Tel. Co.,* 434 U. S. 159, 166–167, that under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, pen registers are not considered "interceptions" because "they do not acquire the 'contents' of communications," as that term is defined by Congress. We are concerned in this case, however, not with the technical definitions of a statute, but with the requirements of the Constitution.

[2] The question whether a defendant who is not a member of the subscriber's household has "standing" to object to pen register surveillance of a private telephone is, of course, distinct. Cf. *Rakas* v. *Illinois,* 439 U. S. 128.

is entitled to constitutional protection, whether or not it is captured by a trespass into such an area.

The numbers dialed from a private telephone—although certainly more prosaic than the conversation itself—are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

I respectfully dissent.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court concludes that because individuals have no actual or legitimate expectation of privacy in information they voluntarily relinquish to telephone companies, the use of pen registers by government agents is immune from Fourth Amendment scrutiny. Since I remain convinced that constitutional protections are not abrogated whenever a person apprises another of facts valuable in criminal investigations, see, *e. g., United States* v. *White,* 401 U. S. 745, 786–790 (1971) (Harlan, J., dissenting); *id.,* at 795–796 (MARSHALL, J., dissenting); *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 95–96 (1974) (MARSHALL, J., dissenting); *United States* v. *Miller,* 425 U. S. 435, 455–456 (1976) (MARSHALL, J., dissenting), I respectfully dissent.

Applying the standards set forth in *Katz* v. *United States,* 389 U. S. 347, 361 (1967) (Harlan, J., concurring), the Court first determines that telephone subscribers have no subjective expectations of privacy concerning the numbers they dial. To reach this conclusion, the Court posits that individuals somehow infer from the long-distance listings on their phone bills, and from the cryptic assurances of "help" in tracing obscene

calls included in "most" phone books, that pen registers are regularly used for recording local calls. See *ante*, at 742–743. But even assuming, as I do not, that individuals "typically know" that a phone company monitors calls for internal reasons, *ante*, at 743,[1] it does not follow that they expect this information to be made available to the public in general or the government in particular. Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes. See *California Bankers Assn.* v. *Shultz*, *supra*, at 95–96 (MARSHALL, J., dissenting).

The crux of the Court's holding, however, is that whatever expectation of privacy petitioner may in fact have entertained regarding his calls, it is not one "society is prepared to recognize as 'reasonable.'" *Ante*, at 743. In so ruling, the Court determines that individuals who convey information to third parties have "assumed the risk" of disclosure to the government. *Ante*, at 744, 745. This analysis is misconceived in two critical respects.

Implicit in the concept of assumption of risk is some notion of choice. At least in the third-party consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications. See, *e. g.*, *Lopez* v. *United States*, 373 U. S. 427, 439 (1963); *Hoffa* v. *United States*, 385 U. S. 293, 302–303 (1966); *United States* v. *White*, *supra*, at 751–752

[1] Lacking the Court's apparently exhaustive knowledge of this Nation's telephone books and the reading habits of telephone subscribers, see *ante*, at 742–743, I decline to assume general public awareness of how obscene phone calls are traced. Nor am I persuaded that the scope of Fourth Amendment protection should turn on the concededly "esoteric functions" of pen registers in corporate billing, *ante*, at 742, functions with which subscribers are unlikely to have intimate familiarity.

(plurality opinion). By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. Cf. *Lopez* v. *United States, supra,* at 465–466 (BRENNAN, J., dissenting). It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative.

More fundamentally, to make risk analysis dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of Fourth Amendment protections. For example, law enforcement officials, simply by announcing their intent to monitor the content of random samples of first-class mail or private phone conversations, could put the public on notice of the risks they would thereafter assume in such communications. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 384, 407 (1974). Yet, although acknowledging this implication of its analysis, the Court is willing to concede only that, in some circumstances, a further "normative inquiry would be proper." *Ante,* at 740–741, n. 5. No meaningful effort is made to explain what those circumstances might be, or why this case is not among them.

In my view, whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society. By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility. As Mr. Justice Harlan, who formulated the standard the Court applies today, himself recognized: "[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not . . . merely recite . . . risks without examining the desirability of saddling them upon society." *United States* v. *White, supra,* at 786 (dissenting opinion). In making this

assessment, courts must evaluate the "intrinsic character" of investigative practices with reference to the basic values underlying the Fourth Amendment. *California Bankers Assn.* v. *Shultz*, 416 U. S., at 95 (MARSHALL, J., dissenting). And for those "extensive intrusions that significantly jeopardize [individuals'] sense of security . . . , more than self-restraint by law enforcement officials is required." *United States* v. *White*, 401 U. S., at 786 (Harlan, J., dissenting).

The use of pen registers, I believe, constitutes such an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships, see *Katz* v. *United States*, 389 U. S., at 352, as well as the First and Fourth Amendment interests implicated by unfettered official surveillance. Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. See *NAACP* v. *Alabama*, 357 U. S. 449, 463 (1958); *Branzburg* v. *Hayes*, 408 U. S. 665, 695 (1972); *id.*, at 728–734 (STEWART, J., dissenting). Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity,[2] I am unwilling to insulate use of pen registers from independent judicial review.

[2] See, *e. g.*, *Reporters Committee For Freedom of Press* v. *American Tel. & Tel. Co.*, 192 U. S. App. D. C. 376, 593 F. 2d 1030 (1978), cert. denied, 440 U. S. 949 (1979); *Halperin* v. *Kissinger*, 434 F. Supp. 1193 (DC 1977); *Socialist Workers Party* v. *Attorney General*, 463 F. Supp. 515 (SDNY 1978).

Just as one who enters a public telephone booth is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," *Katz* v. *United States*, *supra*, at 352, so too, he should be entitled to assume that the numbers he dials in the privacy of his home will be recorded, if at all, solely for the phone company's business purposes. Accordingly, I would require law enforcement officials to obtain a warrant before they enlist telephone companies to secure information otherwise beyond the government's reach.

Syllabus

ARKANSAS *v.* SANDERS

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 77-1497. Argued February 27, 1979—Decided June 20, 1979

Acting on an informant's information that respondent, upon arriving at an airport, would be carrying a green suitcase containing marihuana, Little Rock, Ark., police officers placed the airport under surveillance. They watched as respondent retrieved a green suitcase from the airline baggage service, placed it into the trunk of a taxi, and entered the vehicle with a companion. When the taxi drove away, two of the officers gave pursuit and stopped the vehicle several blocks from the airport, requesting the taxi driver to open the vehicle's trunk. Without asking the permission of respondent or his companion, the police opened the unlocked suitcase and discovered marihuana. Before trial in state court on a charge of possession of marihuana with intent to deliver, respondent moved to suppress the evidence obtained from the suitcase, contending that the search violated his rights under the Fourth and Fourteenth Amendments. The trial court denied the motion and respondent was convicted. The Arkansas Supreme Court reversed, ruling that the marihuana should have been suppressed because it was obtained through an unlawful search of the suitcase.

Held: In the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband. Cf. *United States* v. *Chadwick*, 433 U. S. 1. Pp. 757-766.

(a) In the ordinary case, a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment. P. 758.

(b) The "automobile exception" from the warrant requirement, as set forth in *Carroll* v. *United States*, 267 U. S. 132, and its progeny, will not be extended to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police. Luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy. Once police have seized a suitcase from an automobile, the extent of its mobility is in no way affected by the place from which it was taken; accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from

other places. Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. Pp. 761–766.

262 Ark. 595, 559 S. W. 2d 704, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 766. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 768.

Joseph H. Purvis, Deputy Attorney General of Arkansas, argued the cause for petitioner *pro hac vice*. With him on the briefs were *Steve Clark*, Attorney General, and *Bill Clinton*, former Attorney General.

Jack T. Lassiter, by appointment of the Court, 439 U. S. 1062, argued the cause and filed a brief for respondent.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether, in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband. We took this case by writ of certiorari to the Supreme Court of Arkansas to resolve some apparent misunderstanding as to the application of our decision in *United States* v. *Chadwick*, 433 U. S. 1 (1977), to warrantless searches of luggage seized from automobiles.[1]

**Fred E. Inbau, Frank Carrington, Wayne W. Schmidt,* and *James P. Costello* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal.

[1] Compare *United States* v. *Finnegan*, 568 F. 2d 637, 641–642 (CA9 1977), with *United States* v. *Stevie*, 582 F. 2d 1175, 1178–1179 (CA8 1978) (en banc).

I

On April 23, 1976, Officer David Isom of the Little Rock, Ark., Police Department received word from an informant that at 4:35 that afternoon respondent would arrive aboard an American Airlines flight at gate No. 1 of the Municipal Airport of Little Rock. According to the informant, respondent would be carrying a green suitcase containing marihuana. Both Isom and the informant knew respondent well, as in January 1976 the informant had given the Little Rock Police Department information that had led to respondent's arrest and conviction for possession of marihuana. Acting on the tip, Officer Isom and two other police officers placed the airport under surveillance. As the informant had predicted, respondent duly arrived at gate No. 1. The police watched as respondent deposited some hand luggage in a waiting taxicab, returned to the baggage claim area, and met a man whom police subsequently identified as David Rambo. While Rambo waited, respondent retrieved from the airline baggage service a green suitcase matching that described by the informant. Respondent gave this suitcase to his companion and went outside, where he entered the taxi into which he had put his luggage. Rambo waited a short while in the airport and then joined respondent in the taxi, after placing the green suitcase in the trunk of the vehicle.

When respondent's taxi drove away carrying respondent, Rambo, and the suitcase, Officer Isom and one of his fellow officers gave pursuit and, with the help of a patrol car, stopped the vehicle several blocks from the airport. At the request of the police, the taxi driver opened the trunk of his vehicle, where the officers found the green suitcase. Without asking the permission of either respondent or Rambo, the police opened the unlocked suitcase and discovered what proved to be 9.3 pounds of marihuana packaged in 10 plastic bags.

On October 14, 1976, respondent and Rambo were charged with possession of marihuana with intent to deliver in viola-

tion of Ark. Stat. Ann. § 82-2617 (1976).[2] Before trial, respondent moved to suppress the evidence obtained from the suitcase, contending that the search violated his rights under the Fourth and Fourteenth Amendments. The trial court held a hearing on January 31, 1977, and denied the suppression motion without explanation. After respondent's conviction by a jury on February 3, 1977, he was sentenced to 10 years in prison and was fined $15,000.

On appeal the Supreme Court of Arkansas reversed respondent's conviction, ruling that the trial court should have suppressed the marihuana because it was obtained through an unlawful search of the suitcase. 262 Ark. 595, 559 S. W. 2d 704 (1977). Relying upon *United States* v. *Chadwick, supra,* and *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971), the court concluded that a warrantless search generally must be supported by "probable cause coupled with exigent circumstances." 262 Ark., at 599, 559 S. W. 2d, at 706. In the present case, the court found there was ample probable cause for the police officers' belief that contraband was contained in the suitcase they searched. The court found to be wholly lacking, however, any exigent circumstance justifying the officers' failure to secure a warrant for the search of the luggage. With the police in control of the automobile and its occupants, there was no danger that the suitcase and its contents would be rendered unavailable to due legal process. The court concluded, therefore, that there was "nothing in this set of circumstances that would lend credence to an assertion of impracticality in obtaining a search warrant." *Id.,* at 600, 559 S. W. 2d, at 706.[3]

[2] In addition to the marihuana found in the suitcase, police officers found one ounce of heroin hidden in their patrol car after transporting Rambo to police headquarters. Accordingly, Rambo also was charged with possession of heroin with intent to deliver. Immediately before trial on both counts, the court severed the heroin-possession count for later trial.

[3] "With the suitcase safely immobilized, it was unreasonable to under-

II

Although the general principles applicable to claims of Fourth Amendment violations are well settled, litigation over requests for suppression of highly relevant evidence continues to occupy much of the attention of courts at all levels of the state and federal judiciary. Courts and law enforcement officials often find it difficult to discern the proper application of these principles to individual cases, because the circumstances giving rise to suppression requests can vary almost infinitely. Moreover, an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights. The present case presents an example. Only two Terms ago, we held that a locked footlocker could not lawfully be searched without a warrant, even though it had been loaded into the trunk of an automobile parked at a curb. *United States* v. *Chadwick,* 433 U. S. 1 (1977). In earlier cases, on the other hand, the Court sustained the constitutionality of warrantless searches of automobiles and their contents under what has become known as the "automobile exception" to the warrant requirement. See, *e. g., Chambers* v. *Maroney,* 399 U. S. 42 (1970); *Carroll* v. *United States,* 267 U. S. 132 (1925). We thus are presented with the task of determining whether the warrantless search of respondent's suitcase falls on the *Chadwick* or the *Chambers/Carroll* side of the Fourth Amendment line. Although in a sense this is a line-drawing process, it must be guided by established principles.

We commence with a summary of these principles. The Fourth Amendment protects the privacy and security of per-

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take the additional and greater intrusion of a search without a warrant." 262 Ark., at 601, 559 S. W. 2d, at 707. The court also rejected the State's contention that luggage is entitled to a lesser protection against warrantless searches than are other private areas, such as homes. It noted that suitcases, unlike automobiles, customarily are the repositories for personal effects.

sons in two important ways. First, it guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In addition, this Court has interpreted the Amendment to include the requirement that normally searches of private property be performed pursuant to a search warrant issued in compliance with the Warrant Clause.[4] See, *e. g.*, *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978); *United States* v. *Chadwick*, *supra*, at 9; *United States* v. *United States District Court*, 407 U. S. 297, 317 (1972); *Katz* v. *United States*, 389 U. S. 347, 357 (1967); *Agnello* v. *United States*, 269 U. S. 20, 33 (1925). In the ordinary case, therefore, a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment. See *United States* v. *United States District Court*, *supra*. As the Court said in *Coolidge* v. *New Hampshire*, *supra*, at 481:

> "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement."

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[4] The Warrant Clause of the Fourth Amendment provides that "no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The Fourth Amendment has been made fully applicable to the States by the Fourteenth Amendment. See *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Wolf* v. *Colorado*, 338 U. S. 25 (1949). In this opinion we refer to the Fourth Amendment as it so applies to the State of Arkansas.

The prominent place the warrant requirement is given in our decisions reflects the "basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *United States* v. *United States District Court, supra,* at 317. By requiring that conclusions concerning probable cause and the scope of a search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States,* 333 U. S. 10, 14 (1948), we minimize the risk of unreasonable assertions of executive authority. See *McDonald* v. *United States,* 335 U. S. 451, 455–456 (1948).[5]

Nonetheless, there are some exceptions to the warrant requirement. These have been established where it was concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search. See *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 555 (1976). Thus, a few "jealously and carefully drawn" [6] exceptions provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate. See *United States* v. *United States District Court, supra,* at 318. But because each exception to the warrant requirement invariably impinges to some extent on the protective purpose of

[5] The need for a carefully drawn, limited warrant for searches of private premises was the product in large part of the colonists' resentment of the writs of assistance to which they were subjected by the English. See *United States* v. *Chadwick,* 433 U. S. 1, 8 (1977); J. Landynski, Search and Seizure and the Supreme Court 19 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–78 (1937). Mr. Justice Frankfurter went so far as to suggest that abuses of the writs of assistance were "so deeply felt by the Colonies as to be one of the potent causes of the Revolution." *United States* v. *Rabinowitz,* 339 U. S. 56, 69 (1950) (dissenting opinion).

[6] *Jones* v. *United States,* 357 U. S. 493, 499 (1958).

the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and "the burden is on those seeking the exemption to show the need for it." *United States* v. *Jeffers*, 342 U. S. 48, 51 (1951). See *Chimel* v. *California*, 395 U. S. 752, 762 (1969); *Katz* v. *United States*, *supra*, at 357. Moreover, we have limited the reach of each exception to that which is necessary to accommodate the identified needs of society. See *Mincey* v. *Arizona*, *supra*, at 393; *United States* v. *Chadwick*, 433 U. S., at 15; *Coolidge* v. *New Hampshire*, 403 U. S., at 455.

One of the circumstances in which the Constitution does not require a search warrant is when the police stop an automobile on the street or highway because they have probable cause to believe it contains contraband or evidence of a crime. See *United States* v. *Martinez-Fuerte*, *supra*, at 561–562; *United States* v. *Ortiz*, 422 U. S. 891, 896 (1975); *Texas* v. *White*, 423 U. S. 67, 68 (1975). As the Court said in *Carroll* v. *United States*, 267 U. S., at 153:

> "[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant . . . ."[7]

[7] The willingness of courts to excuse the absence of a warrant where spontaneous searches are required of a vehicle on the road has led to what is called the "automobile exception" to the warrant requirement, although the exception does not invariably apply whenever automobiles are searched. See, *e. g.*, *Coolidge* v. *New Hampshire*, 403 U. S. 443, 461–462 (1971) ("The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears"). See generally Moylan, The Automobile Exception: What it is and What it is not—A Rationale in Search of a Clearer Label, 27 Mercer L. Rev. 987 (1976).

There are essentially two reasons for the distinction between automobiles and other private property. First, as the Court repeatedly has recognized, the inherent mobility of automobiles often makes it impracticable to obtain a warrant. See, *e. g., United States* v. *Chadwick, supra,* at 12; *Chambers* v. *Maroney,* 399 U. S., at 49–50; *Carroll* v. *United States, supra.* In addition, the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property. See *Rakas* v. *Illinois,* 439 U. S. 128, 155 (1978) (POWELL, J., concurring); *United States* v. *Chadwick, supra; South Dakota* v. *Opperman,* 428 U. S. 364, 368 (1978); *Cardwell* v. *Lewis,* 417 U. S. 583, 590 (1974) (plurality opinion); *Cady* v. *Dombrowski,* 413 U. S. 433, 441–442 (1973); *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 279 (1973) (POWELL, J., concurring).

III

In the present case, the State argues that the warrantless search of respondent's suitcase was proper under *Carroll* and its progeny.[8] The police acted properly—indeed commendably—in apprehending respondent and his luggage. They had ample probable cause to believe that respondent's green suitcase contained marihuana. A previously reliable informant had provided a detailed account of respondent's expected arrival at the Little Rock Airport, which account proved to be accurate in every detail, including the color of the suitcase in which respondent would be carrying the marihuana. Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle, searching it on the spot, and seizing the suitcase they suspected contained contraband. See *Chambers* v. *Maroney, supra,* at 52. At oral argument, respondent conceded that the

[8] Respondent concedes that the suitcase was his property, see Brief for Respondent 3, and so there is no question of his standing to challenge the search. See *Simmons* v. *United States,* 390 U. S. 377, 387–388 (1968). Cf. *Rakas* v. *Illinois,* 439 U. S. 128, 148–149 (1978).

stopping of the taxi and the seizure of the suitcase were constitutionally unobjectionable. See Tr. of Oral Arg. 30, 44–46.

The only question, therefore, is whether the police, rather than immediately searching the suitcase without a warrant, should have taken it, along with respondent, to the police station and there obtained a warrant for the search. A lawful search of luggage generally may be performed only pursuant to a warrant. In *Chadwick*, we declined an invitation to extend the *Carroll* exception to all searches of luggage, noting that neither of the two policies supporting warrantless searches of automobiles applies to luggage. Here, as in *Chadwick*, the officers had seized the luggage and had it exclusively within their control at the time of the search. Consequently, "there was not the slightest danger that [the luggage] or its contents could have been removed before a valid search warrant could be obtained." 433 U. S., at 13. And, as we observed in that case, luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy. *Ibid.*

The State argues, nevertheless, that the warrantless search of respondent's suitcase was proper, not because the property searched was luggage, but rather because it was taken from an automobile lawfully stopped and searched on the street. In effect, the State would have us extend *Carroll* to allow warrantless searches of everything found within an automobile, as well as of the vehicle itself. As noted above, the Supreme Court of Arkansas found our decision in *Chadwick* virtually controlling in this case.[9] The State contends, however, that

[9] The facts of the two cases are similar in several critical respects. In *Chadwick*, a locked, 200-pound footlocker was searched without a warrant after the police, acting with probable cause, had taken it from the trunk of a parked automobile. In the present case, respondent's comparatively small, unlocked suitcase also had been placed in the trunk of an automobile and was searched without a warrant by police acting upon probable cause. We do not view the difference in the sizes of the footlocker and suitcase as material here; nor did respondent's failure to lock his suitcase alter its

Chadwick does not control because in that case the vehicle had remained parked at the curb where the footlocker had been placed in its trunk and that therefore no argument was made that the "automobile exception" was applicable. This Court has not had occasion previously to rule on the constitutionality of a warrantless search of luggage taken from an automobile lawfully stopped. Rather, the decisions to date have involved searches of some integral part of the automobile. See, *e. g., South Dakota* v. *Opperman, supra,* at 366 (glove compartment); *Texas* v. *White,* 423 U. S., at 68 (passenger compartment); *Cady* v. *Dombrowski, supra,* at 437 (trunk); *Chambers* v. *Maroney, supra,* at 44 (concealed compartment under the dashboard); *Carroll* v. *United States,* 267 U. S., at 136 (behind the upholstering of the seats).

We conclude that the State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles. A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in *Chadwick,* the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control.[10] See 433 U. S., at 13. Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken.[11] Accordingly, as a general rule there is

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fundamental character as a repository for personal, private effects. Cf. Note, A Reconsideration of the *Katz* Expectation of Privacy Test, 76 Mich. L. Rev. 154, 170 (1977).

[10] The difficulties in seizing and securing automobiles have led the Court to make special allowances for their search. See n. 14, *infra.*

[11] There may be cases in which the special exigencies of the situation would justify the warrantless search of a suitcase. Cf. *Cady* v. *Dombrowski,* 413 U. S. 433 (1973) (police had reason to suspect automobile trunk contained a weapon). Generally, however, such exigencies will depend upon the probable contents of the luggage and the suspect's access to those contents—not upon whether the luggage is taken from an automobile. In

no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.[12]

Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them.[13] Accord-

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the present case the State has conceded that there were no special exigencies. See Tr. of Oral Arg. 16.

Nor do we consider the constitutionality of searches of luggage incident to the arrest of its possessor. See, *e. g.*, *United States* v. *Robinson*, 414 U. S. 218 (1973). The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his "immediate control" at the time of the search.

[12] We have recognized that personal property brought into the country may be searched at the border under circumstances that would not otherwise justify a warrantless search. See *United States* v. *Ramsey*, 431 U. S. 606, 616–617 (1977). Arkansas does not assert, however, that the search of respondent's luggage was a border search. Moreover, it may be that the public safety requires luggage to be searched without a warrant in some circumstances—such as when luggage is about to be placed onto an airplane. This presents questions under the Fourth Amendment wholly absent from the present case.

It is beyond question that the police easily could have obtained a warrant to search respondent's bag if they had taken the suitcase to a magistrate. They had probable cause to believe not only that respondent was carrying marihuana, but also that the contraband was contained in the suitcase that they seized. The State argues that under the circumstances of this case inconvenience to all concerned would have been the only result of deferring search of the suitcase until a warrant was obtained. Those in respondent's position who find such inconvenience unacceptable may avoid it simply by consenting to the search.

[13] Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their

ingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles. We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.[14]

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very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See *Harris* v. *United States*, 390 U. S. 234, 236 (1968) (*per curiam*). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

[14] We are not persuaded by the State's argument that, under *Chambers* v. *Maroney*, 399 U. S. 42 (1970), if the police were entitled to seize the suitcase, then they were entitled to search it. In *Chambers*, the Court upheld the warrantless search of an automobile stopped on the highway by police who believed that its occupants had robbed a gasoline station a short time before. The Court recognized that "[a]rguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained . . . ." *Id.*, at 51. Nonetheless, the Court ruled that a warrantless search was permissible, concluding that there was no constitutional difference between the intrusion of seizing and holding the automobile until a warrant could be obtained, on the one hand, and searching the vehicle without a warrant, on the other.

We view, however, the seizure of a suitcase as quite different from the seizure of an automobile. In *Chambers*, if the Court had required seizure and holding of the vehicle, it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. Moreover, once seized automobiles were taken from the highway the police would be responsible for providing some appropriate location where they could be kept, with due regard to the safety of the vehicles and their contents, until a magistrate ruled on the application for a warrant. Such

In sum, we hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway. Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected.

The judgment of the Arkansas Supreme Court is

Affirmed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE STEVENS joins, concurring in the judgment.

I concur in the Court's judgment but cannot join its unnecessarily broad opinion, which seems to treat this case as if it involved the "automobile" exception to the warrant requirement. It is not such a case.

Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States* v. *Chadwick*, 433 U. S. 1 (1977). The essence of our holding in *Chadwick* is that there is a legitimate expectation of privacy in the contents of a trunk or suitcase accompanying or being carried by a person; that expectation of privacy is not

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a constitutional requirement therefore would have imposed severe, even impossible, burdens on many police departments. See Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835, 841–842 (1974). No comparable burdens are likely to exist with respect to the seizure of personal luggage.

diminished simply because the owner's arrest occurs in a public place. Whether arrested in a hotel lobby, an airport, a railroad terminal, or on a public street, as here, the owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police. If not carrying contraband, many persons arrested in such circumstances might choose to consent to a search of their luggage to obviate any delay in securing their release. But even if wholly innocent, some persons might well prefer not to have the contents of their luggage exposed in a public place. They may stand on their right to privacy and require a search warrant. The warrant requirement is not so onerous as to command suspension of Fourth Amendment guarantees once the receptacle involved is securely in the control of the police, as it was here after Sanders' arrest.

The breadth of the Court's opinion and its repeated references to the "automobile" from which respondent's suitcase was seized at the time of his arrest, however, might lead the reader to believe—as the dissenters apparently do—that this case involves the "automobile" exception to the warrant requirement. See *ante*, at 762–765, and n. 14. It does not. Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an "automobile" exception case. The Court need say no more.

This case simply does not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle, but when they do *not* know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure.

I am not sure whether that would be a stronger or weaker case for requiring a warrant to search the suitcase when a warrantless search of the automobile is otherwise permissible. But it seems to me it would be better to await a case in which the question must be decided.

The dissent complains that the Court does not adopt a "clear" rule, presumably one capable of resolving future Fourth Amendment litigation. That is not cause for lament, however desirable it might be to fashion a universal prescription governing the myriad Fourth Amendment cases that might arise. We are construing the Constitution, not writing a statute or a manual for law enforcement officers. My disagreement with the Court's opinion is very different from that of the dissenters. Our institutional practice, based on hard experience, generally has been to refrain from deciding questions not presented by the facts of a case; there are risks in formulating constitutional rules broader than required by the facts to which they are applied. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936).

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

This case illustrates the difficulties and confusion that *United States* v. *Chadwick*, 433 U. S. 1 (1977), has spawned and will continue to spawn. For reasons stated in dissent in *Chadwick*, *id.*, at 18–22 and 24, I continue to feel that that decision was wrong.

The Court today goes farther down the *Chadwick* road, undermines the automobile exception, and, while purporting to clarify the confusion occasioned by *Chadwick*, creates, in my view, only greater difficulties for law enforcement officers, for prosecutors, for those suspected of criminal activity, and, of course, for the courts themselves. Still hanging in limbo, and probably soon to be litigated, are the briefcase, the wallet, the package, the paper bag, and every other kind of container.

I am unpersuaded by the Court's casual statement, *ante,* at 762 n. 9, that *Chadwick* and this case are factually similar "in several critical respects." Even accepting *Chadwick* as good law, which I do not, this, for me, is a different case. In *Chadwick,* the defendants were arrested, and a 200-pound, double-locked footlocker was seized, as the locker was being loaded into the open trunk of a stationary automobile. The relationship between the footlocker and the vehicle was sufficiently attenuated that the Government chose not to argue in this Court that the automobile exception applied. 433 U. S., at 11. Here, in contrast, the Little Rock police stopped a taxicab on a busy highway at the height of late afternoon traffic. They had probable cause to believe the taxi contained contraband narcotics. They opened the trunk, and briefly examined the contents of a small unlocked suitcase inside. The State has vigorously contended throughout these proceedings that the warrantless search of the trunk and the unlocked suitcase was constitutionally permissible under the automobile exception.[1]

I fully agree. If "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant," *Carroll* v. *United States,* 267 U. S. 132, 153 (1925), then, in my view, luggage and similar containers found in an automobile may be searched for contraband without a warrant. The luggage, like the automobile transporting it, is mobile. And the expectation of privacy in a suitcase found in the car is probably not significantly greater than the expectation of privacy in a locked glove compartment or trunk.

To be sure, as the dissent acknowledged in *Chadwick,* 433 U. S., at 19, impounding the luggage without searching it

[1] Since respondent was not formally arrested until after the suitcase was searched, the State does not argue that the suitcase was examined as part of a search incident to custodial arrest. Cf. *United States* v. *Chadwick,* 433 U. S., at 23, and n. 5 (dissenting opinion).

would be a less intrusive alternative than searching it on the spot. But this Court has not distinguished between the "lesser" intrusion of a seizure and the "greater" intrusion of a search, either with respect to automobiles, *Chambers* v. *Maroney*, 399 U. S. 42, 51–52 (1970), or with respect to persons subject to custodial arrest. *United States* v. *Robinson*, 414 U. S. 218, 235 (1973).[2] And I see no reason to impose such a distinction here. Given the significant encroachment on privacy interests entailed by a seizure of personal property, the additional intrusion of a search may well be regarded as incidental. Moreover, the additional protection provided by a search warrant will be minimal. Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases. Finally, the carving out of a special warrant requirement for one type of personal property, but not for others, will impose untoward costs on the criminal justice systems of this country in terms of added delay and uncertainty.[3]

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[2] The Court stated in *Chambers*, 399 U. S., at 51–52:

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant."

[3] The opinion concurring in the judgment would distinguish between a case where there is probable cause to search the car and its contents as a whole, and a case where there is probable cause to search a particular item of luggage within the car. *Ante*, at 767–768. The opinion suggests, without deciding, that the automobile exception might apply in the former case, but not the latter. Surely, however, the intrusion on privacy, and consequently the need for the protection of the Warrant Clause, is, if anything, greater when the police search the entire interior area of the car, including possibly several suitcases, than when they confine their search to a single

The impractical nature of the Court's line-drawing is brought into focus if one places himself in the position of the policeman confronting an automobile that properly has been stopped. In approaching the vehicle and its occupants, the officer must divide the world of personal property into three groups. If there is probable cause to arrest the occupants, then under *Chimel* v. *California*, 395 U. S. 752 (1969), he may search objects within the occupants' immediate control, with or without probable cause. If there is probable cause to search the automobile itself, then under *Carroll* and *Chambers* the entire interior area of the automobile may be searched, with or without a warrant. But under *Chadwick* and the present case, if any suitcase-like object is found in the car outside the immediate control area of the occupants, it cannot be searched, in the absence of exigent circumstances, without a warrant.

The inherent opaqueness of these "principles," in terms of the policies underlying the Fourth and Fourteenth Amendments, and the confusion to be created for all concerned, are readily illustrated. Suppose a portable luggage-container-rack is affixed to the top of the vehicle. Is the arresting officer constitutionally able to open this on the spot, on the theory that it is like the car's trunk, or must he remove it and take it to the station for a warrant, on the theory that it is like the 200-pound footlocker in *Chadwick*? Or suppose there is

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suitcase. Moreover, given the easy transferability of articles to and from luggage once it is placed in a vehicle, the police would be entitled to assume that if contraband was not found in the suspect suitcase, it would likely be secreted somewhere else in the car. The possibility the opinion concurring in the judgment would preserve for future decision thus contemplates the following two-step ritual: first, the police would take the targeted suitcase to the station for a search pursuant to a warrant; then, if the contraband was not discovered in the suitcase, they would return for a *warrantless* search of other luggage and compartments of the car. It does not require the adjudication of a future controversy to reject that result.

probable cause to arrest persons seated in the front seat of the automobile, and a suitcase rests on the back seat. Is that suitcase within the area of immediate control, such that the *Chadwick-Sanders* rules do not apply? Or suppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attaché case, a duffelbag, a cardboard box, a backpack, a tote-bag, and a paper bag. Which of these may be searched immediately, and which are so "personal" that they must be impounded for future search only pursuant to a warrant? The problems of distinguishing between "luggage" and "some integral part of the automobile," *ante*, at 763; between luggage that is within the "immediate control" of the arrestee and luggage that is not; and between "personal luggage" and other "containers and packages" such as those most curiously described *ante*, at 764–765, n. 13, will be legion. The lines that will be drawn will not make much sense in terms of the policies of the Fourth and Fourteenth Amendments. And the heightened possibilities for error will mean that many convictions will be overturned, highly relevant evidence again will be excluded, and guilty persons will be set free in return for little apparent gain in precise and clearly understood constitutional analysis.

In my view, it would be better to adopt a clear-cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* and *Chambers*. Cf. *United States* v. *Chadwick*, 433 U. S., at 21–22, and n. 3 (dissenting opinion). Such an approach would simplify the constitutional law of criminal procedure without seriously derogating from the values protected by the Fourth Amendment's prohibition of unreasonable searches and seizures.

Syllabus

NATIONAL LABOR RELATIONS BOARD ET AL. *v.* BAPTIST HOSPITAL, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-223. Argued April 23, 1979—Decided June 20, 1979

Intervenor labor union filed unfair labor practice charges with the National Labor Relations Board with respect to respondent hospital's rule prohibiting solicitation by its employees at all times "in any area of the Hospital which is accessible to or utilized by the public," including the lobbies, gift shop, cafeteria, and entrances on the first floor, as well as corridors, sitting rooms, and public restrooms on the other floors. In justification of the rule, respondent offered extensive evidence, through the testimony of doctors and hospital officials, as to the need for the rule to prevent interference with patients' treatment and convalescence, especially as applicable in the corridors and sitting rooms adjoining or accessible to the patients' rooms on the upper floors of the hospital. After applying its presumption that the no-solicitation rule was invalid except in "immediate patient-care areas," the NLRB concluded that respondent had failed to meet the burden placed upon it by such presumption, found that there was no demonstrated likelihood that solicitation outside of "immediate patient-care areas" would disrupt patient care or disturb patients, and, accordingly, issued an order prohibiting respondent from applying the no-solicitation rule in any area of the hospital other than "immediate patient-care areas." The Court of Appeals denied enforcement of the order, holding that respondent had presented sufficient evidence of the ill effects of solicitation on patient care to justify the broad prohibition of solicitation.

Held:

1. Given the definition of "immediate patient-care areas" as areas "such as patients' rooms, operating rooms, and places where patients receive treatment," the NLRB's order prevents respondent from applying its no-solicitation rule not only to its lobbies, cafeteria, and gift shop but also to the corridors and sitting rooms that adjoin or are accessible to patients' rooms and operating and treatment rooms. Pp. 778-781.

2. The Court of Appeals correctly concluded that the NLRB lacked substantial evidence in the record to support its order forbidding any prohibition of solicitation in the corridors and sitting rooms on floors of

the hospital having either patients' rooms or operating and therapy rooms. Nothing in the evidence provided any basis, with respect to those areas, for doubting the accuracy of the doctors' testimony for respondent that union solicitation in the presence or within the hearing of patients may have adverse effects on their recovery. Pp. 784–786.

3. There was, however, substantial evidence in the record to support the NLRB's conclusion that respondent had not justified the prohibition of union solicitation in the cafeteria, gift shop, and lobbies on the first floor of the hospital. While there was no evidence directly contradicting the expert testimony offered by respondent as to the importance of a tranquil hospital atmosphere to successful patient care, nevertheless, when viewed as a whole, the evidence presented by respondent may be regarded fairly as insufficient to rebut the NLRB's presumption that the needs of essential patient care do not require the banning of all solicitation in such areas. Pp. 786–787.

4. This Court does not agree with the apparent view of the Court of Appeals that the NLRB's presumption is irrational in all respects, since experience in such cases as *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, and the present one makes clear that solicitation in at least some of the public areas of hospitals often will not adversely affect patient care or disturb patients. But the evidence in this case and other similar cases does cast serious doubt on a presumption as to hospitals so sweeping that it embraces solicitation in the corridors and sitting rooms on floors occupied by patients. Pp. 787–790.

576 F. 2d 107, affirmed in part and vacated and remanded in part.

POWELL, J., delivered the opinion of the Court, in which STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 791. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 791. BRENNAN, J., filed an opinion concurring in the judgment, in which WHITE and MARSHALL, JJ., joined, *post*, p. 793.

Norton J. Come argued the cause for petitioner National Labor Relations Board. With him on the brief were *Solicitor General McCree, John S. Irving, Linda Sher,* and *David F. Zorensky. Laurence Gold* argued the cause for intervenor Local 150–T Service Employees International Union. With him on the briefs were *Lester Asher, J. Albert Woll,* and *George Kaufmann.*

Fred W. Elarbee argued the cause for respondent. With him on the brief was *David M. Vaughan.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question of the validity of an order of the National Labor Relations Board (Board) prohibiting respondent, Baptist Hospital (Hospital), from enforcing any rule against solicitation by employees "on behalf of any labor organization during their nonworking time in any area of its hospital other than immediate patient care areas."

I

The Hospital is a nonprofit general hospital with 600 beds and 1,800 employees. For several years prior to 1974, the Hospital enforced a rule against solicitation anywhere on its premises.[1] The intervenor, Local 150–T, Service Employees International Union, AFL–CIO (Union), in August 1974 began a campaign to organize the Hospital's employees. The Hospital, at least partly in response to this organizational activity, promulgated a new rule prohibiting solicitation by employees at all times "in any area of the Hospital which is accessible to or utilized by the public." These areas include the lobbies, gift shop, cafeteria, and entrances on the first

**Richard Dorn* filed a brief for the National Union of Hospital and Health Care Employees as *amicus curiae* urging reversal.

William Francis Ford and *Samuel Dunbar Hewlett* filed a brief for the Hospital Corporation of America as *amicus curiae*.

[1] The rule read:

"In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval from Administration. Violation of this policy will subject employee to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their Supervisor."

This rule was adopted primarily to keep salesmen out of the Hospital. *Baptist Hospital, Inc.*, 223 N. L. R. B. 344, 348, 357 (1976), enf. granted in part and denied in part, 576 F. 2d 107 (CA6 1978).

floor of the hospital as well as the corridors, sitting rooms, and public restrooms on the other floors. In parts of the Hospital not open to patients and their visitors, employee solicitation is allowed in work areas on nonwork time, and distributions are allowed in nonwork areas on nonwork time.[2]

The Union filed charges with the Board, which thereupon issued a complaint against the Hospital. The complaint focused primarily on the Hospital's no-solicitation rule, charging that the broad proscriptions contained in the rule violated § 8 (a)(1) of the National Labor Relations Act (Act), as amended, 29 U. S. C. § 158 (a)(1).[3] After hearing testi-

[2] The new rule governing solicitation in the Hospital provides:

"No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitations of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.

"No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time."

All of the parties agree that the restrictions on solicitation and distribution imposed with respect to areas of the Hospital not accessible to patients and the public are in conformity with existing law.

[3] Section 8 (a)(1), as set forth in 29 U. S. C. § 158 (a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights [of self-organization and collective bargaining] guaranteed in section 157 of [Title 29]."

The complaint also charged that the Hospital had violated § 8 (a)(3) of the Act, 29 U. S. C. § 158 (a)(3), by discriminating against an employee, Russell French, on account of his union organizational activities. The Board sustained this charge, ordering the Hospital to reinstate French and pay him any wages lost because of such discrimination. French died before the decision of the case in the Court of Appeals, leaving only the issue of backpay. The Court of Appeals, after concluding that the Hospital's

monial evidence introduced by both the Hospital and the General Counsel for the Board, the Administrative Law Judge concluded that the Hospital's no-solicitation rule was invalid. *Baptist Hospital, Inc.*, 223 N. L. R. B. 344, 347 (1976). The Board agreed, and issued an order that the Hospital cease and desist from "[p]romulgating, maintaining in effect, enforcing, or applying any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any area of its hospital other than immediate patient care areas." *Id.*, at 346.[4]

The Board sought enforcement of its order by the Court of Appeals. After reviewing the evidence of record before the Board, the court concluded that the Hospital had presented evidence of the ill effects of solicitation on patient care that justified the broad prohibition of solicitation.[5] The court accordingly denied enforcement of the Board's order. 576 F. 2d 107 (CA6 1978). We granted the Board's petition for certiorari, 439 U. S. 1065 (1979), and now affirm in part and vacate and remand in part.

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no-solicitation rule did not violate § 8 (a) (1), remanded to the Board for a determination of what portions of the backpay previously ordered were unrelated to the Hospital's no-solicitation rule. 576 F. 2d, at 111. Neither the Board nor the Hospital has questioned this disposition of the § 8 (a) (3) claim.

[4] Section 1 (a) of the Board's order; see 223 N. L. R. B., at 346. In § 2 (b) of its order, the Board also directed the Hospital to rescind its existing no-solicitation rule "to the extent that it prohibits its employees from soliciting on behalf of a labor organization during their nonworking time in any nonworking area of the Hospital including those areas open to the public." 223 N. L. R. B., at 346, 361.

[5] The court also noted that the proscription of solicitation and distribution did not extend to the Hospital's parking lots. "[I]n denying enforcement of the Board's order we construe the hospital's . . . rule to apply only to areas within the various buildings occupied by the hospital and those exterior areas immediately adjacent to entrances used by patients and the public." 576 F. 2d, at 111. This conclusion comports with the testimony given at the administrative hearing on the Board's complaint. App. 34, 45, 63.

II

The Board, in implementing the 1974 extension of the Act to nonprofit health-care institutions,[6] has modified its general rule regarding the validity of employer regulations of solicitation. Because its usual presumption that rules against solicitation on nonwork time are invalid [7] gives too little weight to the need to avoid disruption of patient care and disturbance of patients in the hospital setting, the Board has indicated that it will not regard as presumptively invalid proscriptions on solicitation in immediate patient-care areas.[8] In *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483 (1978), the Court considered the general acceptability of the use of this presumption by the Board.

At issue in *Beth Israel Hospital* was that hospital's rule against solicitation in its cafeteria and coffeeshop. The Court, in the course of affirming a decision of the Board that struck down the no-solicitation rule, described the Board's general approach to such rules.

"The Board concluded that prohibiting solicitation in

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[6] Act of July 26, 1974, 88 Stat. 395; see *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 485, and n. 1 (1978).

[7] *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 803–804, and n. 10 (1945).

[8] The Board first announced this modification of the presumption in *St. John's Hospital & School of Nursing, Inc.*, 222 N. L. R. B. 1150 (1976), enf. granted in part and denied in part, 557 F. 2d 1368 (CA10 1977). The Board has applied its modified presumption in a number of subsequent cases involving union organizational activities in hospitals, including, in addition to the present case, *Beth Israel Hospital*, 223 N. L. R. B. 1193 (1976), enf'd, 554 F. 2d 477 (CA1 1977), aff'd, 437 U. S. 483 (1978); *Lutheran Hospital of Milwaukee*, 224 N. L. R. B. 176 (1976), enf. granted in part and denied in part, 564 F. 2d 208 (CA7 1977), vacated and remanded, 438 U. S. 902 (1978); *Baylor University Medical Center*, 225 N. L. R. B. 771 (1976), enf. granted in part and denied in part, 188 U. S. App. D. C. 109, 578 F. 2d 351, vacated in part and remanded, 439 U. S. 9 (1978); *St. Joseph Hospital*, 228 N. L. R. B. 158 (1977).

> [immediate patient-care areas] was justified and required striking the balance against employees' interests in organizational activity. The Board determined, however, that the balance should be struck against the prohibition in areas other than immediate patient-care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas." *Id.*, at 495.

The Court found no merit in Beth Israel's argument that the Board's use of such a presumption was inconsistent with the legislative intent underlying extension of the Act to nonprofit health-care institutions. The Congress has committed to the Board the task of striking the appropriate balance among the interests of hospital employees, patients, and employers, a role familiar to the Board in other contexts. *Beth Israel Hospital* v. *NLRB*, *supra*, at 496–497, 500–501; *Hudgens* v. *NLRB*, 424 U. S. 507, 521–523 (1976). And the balance struck by the Board—solicitation on nonwork time may be prohibited only where necessary to avoid disruption of patient care or disturbance of patients—is not inconsistent with the Act. *Beth Israel Hospital* v. *NLRB*, *supra*, at 497–500. Accordingly, the Court held "that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act." 437 U. S., at 507.

The scope of the Board's presumption depends upon the definition of the phrase "immediate patient-care areas." The Court had no occasion in *Beth Israel* to determine or review the limits of the Board's definition. The attack on the no-solicitation rule at issue there focused entirely on the prohibition of solicitation in the cafeteria and coffeeshop, and the Board's order was limited to a requirement that the hospital

"[r]escind its written rule prohibiting distribution of union literature and union solicitation in its *cafeteria and coffee-shop.*" *Beth Israel Hospital,* 223 N. L. R. B. 1193, 1199 (1976) (emphasis added); see *NLRB* v. *Beth Israel Hospital,* 554 F. 2d 477, 482 (CA1 1977), aff'd, 437 U. S. 483 (1978). The Board's definition of "immediate patient-care areas" is essential, however, to an understanding of both the operation of the presumption and the Board's final order in the present case. The Hospital's rule prohibits solicitation in all areas of the Hospital open to patients or visitors, and the complaint charged that the Hospital had violated § 8 (a)(1) by maintaining an overly broad rule against solicitation. 223 N. L. R. B., at 347, 355. The Board's order covers all areas of the Hospital, and explicitly limits application of a no-solicitation rule to areas of "immediate patient care." [9]

Neither the Board nor the Administrative Law Judge mentioned in their respective opinions the exact scope that they assigned to the term "immediate patient-care areas." But, as the Court of Appeals remarked, 576 F. 2d, at 109, the Board based its ruling on the analysis it had adopted in *St. John's Hospital & School of Nursing, Inc.,* 222 N. L. R. B. 1150 (1976), enf. granted in part and denied in part, 557 F. 2d 1368 (CA10 1977). See 223 N. L. R. B., at 344 n. 2. In *St. John's Hospital,* the Board stated that immediate patient-care areas are areas "such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." 222 N. L. R. B., at 1150. Thus, it appears that in the present case the Board assumed the validity of prohibitions on solicitation only in these limited areas, treating any broader ban as presumptively invalid.

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[9] The order recommended by the ALJ was phrased in terms of "non-working areas" (Hospital forbidden to interfere with solicitation on non-working time in "nonworking areas"), but the Board substituted an order prohibiting interference with solicitation on nonwork time in areas other than those for "immediate patient care." 223 N. L. R. B., at 346, 361.

And given this definition of patient-care areas, the Board's order prevents the Hospital from applying a no-solicitation rule not only to its lobbies, cafeteria, and gift shop but also to the corridors and sitting rooms that adjoin or are accessible to patients' rooms and operating and treatment rooms.[10]

III

The Board's presumption, of course, does no more than place on the Hospital the burden of proving, with respect to areas to which it applies, that union solicitation may adversely affect patients. Accordingly, in *Beth Israel* the Court described the Board's presumption as a ban on the prohibition of solicitation in areas other than immediate patient-care areas "where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients." 437 U. S., at 507; accord, *id.*, at 495.[11] The hospital in *Beth Israel* failed to introduce any evidence that the proscription of solicitation in its cafeteria and coffee-shop was necessary to prevent either disruption of patient care or disturbance of patients. The Court found that "patient

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[10] Although the Board has never published a more definite list of "immediate patient-care areas" than the one included in *St. John's Hospital & School of Nursing, Inc.*, nothing in its subsequent opinions has suggested that the Board views areas other than patients' rooms, operating rooms, and treatment rooms as areas of immediate patient care. In *Baylor University Medical Center* v. *NLRB*, 188 U. S. App. D. C., at 110–111, 578 F. 2d, at 352–353, for example, the corridors of the hospital as well as its cafeteria were excluded by the Board from "immediate patient-care areas."

[11] The Court's restatement of the Board's presumption makes it clear that a hospital may overcome the presumption by showing that solicitation is likely either to disrupt patient care *or* disturb patients. The distinction is an important one. Solicitation may disrupt patient care if it interferes with the health-care activities of doctors, nurses, and staff, even though not conducted in the presence of patients. And solicitation that does not impede the efforts of those charged with the responsibility of caring for patients nonetheless may disturb patients exposed to it.

use of the cafeteria [was] voluntary, random, and infrequent," and considered it of "critical significance that only 1.56% of the cafeteria's patrons are patients." *Id.*, at 502; see also *id.*, at 508–509 (BLACKMUN, J., concurring in judgment); *id.*, at 516–517 (POWELL, J., concurring in judgment).

In the present case, in contrast, extensive evidence was offered, through the testimony of doctors and a hospital administrator, in justification of the no-solicitation rule. The Board, after applying its presumption to the evidence before it, concluded that the Hospital had failed to meet the burden placed upon it by the presumption. In doing so, the Board made a finding of fact that there was no demonstrated likelihood that solicitation outside of "immediate patient-care areas" would disrupt patient care or disturb patients. 223 N. L. R. B., at 357; 576 F. 2d, at 109.

Such findings are binding on the reviewing courts, but only if they are supported by "substantial evidence on the record considered as a whole." Act, § 10 (e), 29 U. S. C. § 160 (e). When the Board's findings lack such support in the record, the reviewing courts must set them aside, along with the orders of the Board that rest on those findings. Administrative Procedure Act, 5 U. S. C. § 706 (2)(E); *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490 (1951). The Court of Appeals, exercising its reviewing function, determined that the Board's findings were contrary to the proof of record, which in its view provided adequate support for the application of the no-solicitation rule in all areas of the Hospital. We think that the correct position lies between those taken by the Board and the court below. While the Board's holding with respect to some of the areas in dispute has substantial evidentiary support in the record, the Court of Appeals was justified in concluding that the Board lacked such support for its sweeping protection of solicitation in all but "immediate patient-care areas."

The Hospital's Vice President for Personnel Services, Vic-

tory, testified that the no-solicitation rule was adopted because of concern about the ill effects of union organizational activity on patients. App. 5–6, 31. The general purpose of the rule, he indicated, is to protect the patients and their families from the disquiet that might result if they perceived that the Hospital's staff had concerns other than the care of patients. *Id.*, at 12, 13. The rule rests, in Victory's words, on the Hospital's experience: "we have found that anytime we do anything that lets a patient or their [*sic*] family see that we have our mind on anything but patient care, this is very disruptive to the patient and sometimes affects the patient's ability to recover." *Id.*, at 12. The Hospital's Chief of Medical Staff, Ricketson, echoed this rationale for proscription of solicitation in any area of the Hospital open to patients or their visitors, emphasizing that the "psychological attitudes [of patients] play a good part," *id.*, at 57, in determining the success of their treatment. See *id.*, at 53, 57–58, 62. Another doctor, Birmingham, testified that because "[p]eople who are physically ill are more emotionally upset," it is essential to create within the Hospital the tranquillity that is most conducive to their recovery. *Id.*, at 43–44. The Court of Appeals laid great stress on this aspect of the evidence before the Board, stating that "[t]hese witnesses, two physicians and an experienced hospital administrator, repeatedly referred to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors. The testimony of the medical witnesses related this requirement directly to the well-being of the patients. The witnesses made no distinction between areas of immediate patient care and other areas of the hospital." 576 F. 2d, at 109–110.[12]

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[12] MR. JUSTICE BLACKMUN has commented perceptively on the importance of maintaining a peaceful and relaxed atmosphere within hospitals. "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing

The evidence concerning the corridors and sitting rooms adjoining or accessible to the patients' rooms and treatment rooms on the upper floors of the Hospital provided more detailed illustration of the need for a no-solicitation rule applicable to those areas. Patients in the most critical and fragile conditions often move or are moved through these corridors, either en route to treatment in some other part of the Hospital or as part of their convalescence. App. 10, 24, 54, 64.[13] The increased emphasis in modern hospitals on the mobility of patients as an important aspect of patient therapy is well known, and appears to be a part of patient care at the Hospital. *Id.*, at 40–41, 54. Small public rooms or sitting areas on the patient-care floors, as well as the corridors themselves, provide places for patients to visit with family and friends, as well as for doctors to confer with patients' families—often during times of crisis. *Id.*, at 24, 40, 55–56. Nothing in the evidence before the Board provided any basis, with respect to those areas of the Hospital, for doubting the accuracy of the statements made by Ricketson and Birmingham that union solicitation in the presence or within the hearing of patients may have adverse effects on their recovery. *Id.*, at 23, 39–40, 57–58, 62.

The Hospital also presented uncontradicted evidence that solicitation on nonwork time is allowed in other areas even under the no-solicitation rule at issue here. These areas in-

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and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." *Beth Israel Hospital* v. *NLRB*, 437 U. S., at 509 (concurring in judgment).

[13] Although the elevators and stairways in every hospital also are used by patients moving and being moved to and from various treatment areas, the Hospital presented no specific evidence regarding these areas, and the Board made no specific finding as to them.

clude the 26 nurses' stations [14] and adjoining utility rooms located throughout the Hospital, two employee lounges, and the maintenance and laundry buildings. *Id.*, at 8, 16, 25–26. Especially in view of our ruling upholding the Board's position on the first-floor lobbies, gift shop, and cafeteria, the availability of these alternative locations for solicitation, though not dispositive, lends support to the validity of the Hospital's ban on such activity in other areas of the Hospital. As the Court remarked in *Beth Israel:*

> "[I]n the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid. While outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry . . . , it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility." 437 U. S., at 505.

We conclude that, with respect to the corridors and sitting rooms on patients' floors, the Court of Appeals correctly determined that there was no substantial evidence of record to sup-

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[14] The Hospital exempts nurses' stations from the ban on solicitation in areas that are accessible to patients and visitors, but does subject them to the prohibition against solicitation in work areas on working time. App. 18–19, 25. The Hospital's acceptance of solicitation in nurses' stations during employees' nonworking time appears to rest on the partition of these stations from surrounding areas open to patients, and on the use of the stations by employees on breaks from work. *Id.*, at 25–26. It may well be that in other hospitals, solicitation in these critical areas would threaten to disturb patients or disrupt patient care, since there are always some employees on duty there.

port the Board's holding that the Hospital had failed to justify its ban on solicitation in these areas.

The same may not be said, however, of the cafeteria, gift shop, and lobbies on the first floor of the Hospital. No evidence directly contradicting the professional judgments of Victory, Birmingham, and Ricketson as to the importance of a tranquil hospital atmosphere to successful patient care was presented to the Board. But when viewed as a whole, the evidence presented by the Hospital may be regarded fairly as insufficient to rebut the Board's presumption that the needs of essential patient care do not require the banning of all solicitation in such areas.[15] The Hospital presented no clear evidence of the frequency with which patients use the cafeteria and gift shop, or visit the lobbies on the first floor. See App. 11–13, 27, 36–38. It appears that patients normally remain on the floors of the Hospital above the first floor, with visits to the first floor only by some patients and then only occasionally. *Id.*, at 20, 28, 35–36, 64. In fact, a patient must have special permission to leave the floor on which his room is located, as well as to take meals in the cafeteria. *Id.*, at 54, 64; 223 N. L. R. B., at 348. From this evidence, one may conclude reasonably that only those patients who are judged fit to withstand the activities of the public areas on the first floor are allowed to visit those parts of the Hospital. Moreover, both Victory and Ricketson testified that at least some kinds of solicitation in public areas such as the cafeteria would be unlikely to have a significant adverse impact on patients or patient care. App. 10, 31–32, 62. It thus appears that there was substantial evidence in the record to support the Board's conclusion that the Hospital had not justified the

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[15] The courts of appeals are required to review the substantiality of evidence to support the Board's findings "on the record *considered as a whole*," 29 U. S. C. § 160 (e) (emphasis added). Here, it appears that the Court of Appeals failed to give appropriate weight to the evidence favorable to the Board regarding the cafeteria, gift shop, and lobbies.

prohibition of union solicitation in the cafeteria, gift shop, and lobbies on the first floor of the Hospital.

IV

In addition to reviewing the sufficiency of the evidence in this case to support the Board's findings and order, the Court of Appeals also adopted a broader rationale for refusing to enforce the order. "In the setting of a modern general hospital," it stated, "it is difficult to define the areas of immediate patient care." 576 F. 2d, at 110. Since patients visit many parts of such a hospital during their treatment and convalescence, activities anywhere in the public areas of the hospital may well affect their recovery. Thus, the Court of Appeals concluded, in effect, that the Board's presumption that solicitation outside of immediate patient-care areas does not disrupt patient care or disturb patients is irrational, and that the Board should be required to prove that solicitation in any particular patient-access area will not interfere with patients' treatment or convalescence.

It is, of course, settled law that a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts. As the Court stated in *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 804–805 (1945), "[l]ike a statutory presumption or one established by regulation, the validity [of the Board's presumption regarding the permissibility of no-solicitation rules], perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred." More recently, in *Beth Israel*, the Court again recognized that the courts have the duty to review the Board's presumptions both "for consistency with the Act, and for rationality." 437 U. S., at 501.

We do not share the apparent view of the Court of Appeals that the Board's presumption is irrational in all respects, since experience in cases such as *Beth Israel* and the present one makes clear that solicitation in at least some of the public

areas of hospitals often will not adversely affect patient care or disturb patients. The evidence of record in this case and other similar cases does, however, cast serious doubt on a presumption as to hospitals so sweeping that it embraces solicitation in the corridors and sitting rooms on floors occupied by patients. Since the 1974 amendments to the Act, each hospital making the attempt has overcome the effect of the Board's presumption as applied to such corridors and sitting rooms. The evidence by which the Hospital rebutted the presumption in the present case has been reviewed above. In *Baylor University Medical Center* v. *NLRB*, 188 U. S. App. D. C. 109, 578 F. 2d 351 (1978), vacated in part and remanded, 439 U. S. 9 (1978), the evidence demonstrating the need for the prohibition of solicitation in such areas was even more extensive.

> "The importance of preventing crowding and disruption in the hospital corridors cannot be seriously debated. Experienced witnesses testified of the extent to which congestion in the corridors impedes the operation of the medical staff and annoys patients and visitors. Quick and unimpeded passage through the hallways was shown to be imperative to the efficient operation of the hospital and to the success of certain of its emergency services, such as the cardiac arrest unit. The hallways serve not only as passageways for patients, visitors, doctors, and medicine, but also as viewing rooms for the nursery and storerooms for a variety of hospital equipment which must be available at a moment's notice. There was also testimony that a great deal of the physical therapy undertaken at [the hospital] actually took place in the corridors, and that for many departments the corridors served as the only available waiting room." 188 U. S. App. D. C., at 113–114, 578 F. 2d, at 355–356 (footnotes omitted).

After reviewing the record in *St. John's Hospital & School of Nursing, Inc.* v. *NLRB*, 557 F. 2d 1368 (CA10 1977), the court

there found that the Board's presumption (first adopted in that case) was unsupported by any evidence that solicitation in such areas would not adversely affect patient care. It concluded that to save the Board's presumption, "the Board's definition of 'strictly patient care areas' must be interpreted to include such areas as halls, stairways, elevators, and waiting rooms accessible to patients." *Id.*, at 1375.

Because the evidence presented by the Hospital in this case is sufficient to rebut the Board's presumption as applied to corridors and sitting rooms on patients' floors, we need not here decide the rationality of this portion of the Board's presumption, or undertake the task of framing the limits of an appropriate presumption regarding the permissibility of union solicitation in a modern hospital. Indeed, the development of such presumptions is normally the function of the Board. It must be said, however, that the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital.[16] In its con-

[16] The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even the corridors, where patients often are encouraged to walk, or to visit with their families. In different hospitals, the use and physical layout of such a variety of areas may require varying resolutions of questions about the validity of bans on union solicitation. In addition, outpatient clinics such as the Hospital's emergency room and "shortstay" unit, App. 28, 35, may raise special considerations because of the nature of the services rendered to patients there.

Some corridors in some hospitals, as well as elevators and stairways, may be used neither for treatment nor for care, but may be of great importance in the movement of patients (and emergency equipment) through the hospital. *Id.*, at 54; see *Baylor University Medical Center* v. *NLRB*, 188

tinuous review of the usefulness of its presumption, the Board should be mindful of the Court's admonition in *Beth Israel*.

> " '[T]he Board [bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.' " 437 U. S., at 508, quoting *NLRB* v. *Beth Israel Hospital*, 554 F. 2d, at 481.

V

The Court of Appeals correctly concluded that the Board lacked substantial evidence in the record to support its order forbidding any prohibition on solicitation in the corridors and sitting rooms on floors of the Hospital housing either patients' rooms or operating and therapy rooms, and we affirm that portion of its judgment. The judgment of the Court of Appeals with respect to other parts of the Hospital is vacated, and the

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U. S. App. D. C., at 113–114, 578 F. 2d, at 355–356. Still another group of areas, including cafeterias and gift shops, also may present difficult problems regarding the validity of no-solicitation rules. As MR. JUSTICE BLACKMUN noted in his opinion concurring in the judgment in *Beth Israel*, "[t]here are many hospital coffeeshops and cafeterias that are primarily patient and patient-relative oriented, despite the presence of employee patrons." 437 U. S., at 509.

In discharging its responsibility for administration of the Act, the Board must frame its rules and administer them with careful attention to the wide variety of activities within the modern hospital. The Union, and other labor organizations involved before the Board in cases similar to the present one, have adopted this view, urging the Board to abandon the simplistic "immediate patient care" criterion. See Brief for Intervenor 38–42.

case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment. I write only to underline what is plainly said in the opinion, *ante*, at 789–790, and n. 16, that these hospital cases so often turn on the proof presented. What may be true of one hospital's gift shop and cafeteria may not be true of another's. And I continue to have difficulty perceiving any rational distinction between the Board's recognition that solicitation is inappropriate in a department store, see *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 511–512, and nn. 2 and 3 (1978) (POWELL, J., concurring in judgment); *id.*, at 508 (concurring opinion), and its contrary presumption with respect to the retail shop (usually operated on a not-for-profit basis) and cafeteria in the hospital. The admonition contained in the last paragraph of n. 16 of the Court's opinion, *ante*, at 790, cannot be overemphasized.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur only in the judgment because I do not agree with the basis of the Court's opinion. The Court accepts as valid the Board's presumption that hospital rules prohibiting solicitation during nonworking time outside of "*immediate* patient care areas" violate employees' right to organize. The Court denies enforcement to the Board's order in part on the ground that its finding that the Hospital failed to overcome this presumption was not supported by substantial evidence.

I would think no "evidence" is needed to establish the proposition that the primary mission of every hospital is care and concern for the patients and that anything which tends to interfere with that objective cannot be tolerated. A religious choir singing in a hospital chapel may well be desirable but if that interferes with patient care, it cannot be allowed.

To be supportable a presumption cannot rest on grounds which are irrational. *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978). For me, it is wholly irrational for the Board to create a presumption that removes from the hospital absolute authority to control all activity in areas devoted primarily to patient care, including all areas frequented by patients. I would place the decision on the basis that: (1) the Board's presumption is wholly invalid as applied to areas of a hospital devoted primarily to the care of patients; (2) once the Board's order is deprived of the support of the presumption, it must be scrutinized to determine if it is supported by independent substantial evidence. That examination leads me to the conclusion that the Board's order is not supported by substantial evidence with respect to any of the patient-care areas or public areas above the first floor of the Hospital.

In short the Board's presumption is wholly invalid as applied to any area of the hospital devoted primarily to the care of patients for the reasons stated in MR. JUSTICE POWELL's opinion concurring in the judgment in *Beth Israel Hospital*, *supra*, at 510–514, which I joined. A hospital differs from a factory or industrial establishment. This is especially important in light of the Board's presumption against solicitation in the analogous public areas of restaurants and retail stores. *Id.*, at 511–513.

Nothing in *Beth Israel Hospital* is to the contrary. There the Court stressed the necessity for continuing development and possible revision of the Board's approach to hospital employees' activities. *Id.*, at 507–508. Moreover, MR. JUSTICE BRENNAN, speaking for the Court in that case, carefully explained that the particular cafeteria there was primarily an employee-service area, *id.*, at 506, not a patient-care facility.

The inquiry then properly turns to whether the Board's decision was supported by substantial evidence on the record as a whole. On the basis of the evidence described by the Court, *ante*, at 782–786, it seems clear to me that the decision

of the Board was not supported by substantial evidence with respect to public areas above the first floor of the Hospital. The fundamental issue in cases such as this is whether the employees' organizational rights affected by the hospital rules in question are superior to the hospital's needs in carrying out its mission.

The central "business" of a hospital is not a business in the sense that term is generally used in industrial contexts. The hospital's only purpose is the care and treatment of its patients, and I agree fully with the Court's statement that "[n]othing in the evidence before the Board provided any basis . . . for doubting the accuracy of the [testimony] that union solicitation in the presence or within the hearing of patients may have adverse effects on their recovery." *Ante,* at 784. The union's interest in membership solicitation in the public area of the Hospital above the first floor was severely undercut by the availability of abundant alternative areas for such union activity. Whatever doubts there may be as to the adverse effects on patients should be resolved in favor of their protection. I would not elevate the interests of unions or employees, whose highest duty is to patients, to a higher plane than that of the patients.

The evidence described by the Court, *ante,* at 786–787, demonstrates that the gift shop on the first floor is maintained primarily for the accommodation of visitors who wish to purchase articles for patients and is not a "patient-care" area; as in *Beth Israel, supra,* the first floor cafeteria is not a primarily patient-care area.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in the judgment.

In this case, the Court of Appeals for the Sixth Circuit found that respondent had demonstrated the special circumstances necessary to overcome the NLRB's presumption against bans on solicitation, and that there was no substantial

evidence to support the Board's holding to the contrary. The scope of our review of such a Court of Appeals finding is narrowly circumscribed:

> "'Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.'" *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 507 (1978), quoting *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 491 (1951).

Because I believe that the Court of Appeals "misapprehended or grossly misapplied" the substantial-evidence rule with respect to the cafeteria, gift shop, and first-floor lobbies of Baptist Hospital, but that the same cannot be said for the patient-floor corridors and sitting rooms, I concur in the judgment of the Court.

I

As the Court notes, "[t]he Hospital presented no clear evidence of the frequency with which patients use the cafeteria and gift shop, or visit the lobbies on the first floor," *ante*, at 786. See App. 11–13, 27, 36–38. In fact, the evidence demonstrated that patients normally remain on floors above the first floor, *id.*, at 20, 28, 35–36, 64; that they must have special permission to leave the floor on which their room is located, or to eat in the cafeteria, *id.*, at 64; *Baptist Hospital, Inc.*, 223 N. L. R. B. 344, 348 (1976); and that only a small number of patients actually use the cafeteria, App. 50, 64; 223 N. L. R. B., at 348. See generally, *ante*, at 786–787. Given such evidence, the Hospital could not have overcome the Board's presumption against solicitation bans in nonimmediate patient-care areas—that is, the Hospital could not have met its affirmative burden to demonstrate that the prohibition was "necessary to avoid disruption of health-care operations or

disturbance of patients," *Beth Israel Hospital* v. *NLRB, supra,* at 507. Since there clearly was substantial evidence to support the Board's determination that the presumption was not overcome, the Court of Appeals' holding to the contrary constituted a gross misapplication of the appropriate standard of review of Board findings.*

The same cannot be said of the Court of Appeals' holding with respect to those corridors and sitting rooms which adjoin, or are accessible to, the patient and treatment rooms on the upper floors. There was evidence that "[p]atients in the most critical and fragile conditions often move or are moved through these corridors, either en route to treatment in some other part of the Hospital or as part of their convalescence," *ante,* at 784. See App. 54, 64. Considerable additional evidence, including the testimony of two doctors, suggested that *in this hospital,* in these areas, a prohibition of solicitation was necessary to avoid disruption of health-care operations or disturbance of patients. See *ante,* at 782–784. This does not

*The Court of Appeals' misapplication of the standard of review of evidence may have been partially due to its misapprehension of the legal merits of the Board's presumption as applied to cafeterias. Although the court based its holding primarily upon a factual finding that the Hospital "did carry its burden in the present case" to establish the circumstances justifying a ban on solicitation, it also questioned the legal distinction which the Board makes between hospital cafeterias and public restaurants. See 576 F. 2d 107, 110 (1978). The Court of Appeals noted that the Board's insistence upon applying the presumption to the former, while not applying it to the latter, was rejected by the Court of Appeals for the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB,* 188 U. S. App. D. C. 109, 578 F. 2d 351 (1978).

Subsequent to the Court of Appeals decision below, we upheld the NLRB's distinction between public and hospital cafeterias, *Beth Israel Hospital* v. *NLRB,* 437 U. S., at 505–507, and vacated the decision of the Court of Appeals for the District of Columbia Circuit on that question. See *NLRB* v. *Baylor University Medical Center,* 439 U. S. 9 (1978). It may well be that had the court below had the benefit of our decision in *Beth Israel,* it might have viewed more favorably the Board's findings concerning Baptist Hospital's cafeteria.

mean that were this Court reviewing the evidence *de novo*, or even were it applying the standard of review appropriate for the Court of Appeals, it would have been inexorably driven to conclude that the presumption against no-solicitation rules was adequately overcome. But we do not sit as a court of first, or even second, instance. We cannot overturn the Court of Appeals' decision as to the substantiality of the evidence unless it misapprehended or grossly misapplied the appropriate standard of review. And given the evidence presented on the questions concerning the upper floors of the hospital, I cannot say that the appellate court so erred here.

II

Both this opinion, and that of the Court, base their dispositions of the Board's petition upon the evidence presented in this case; neither rejects the legality of the presumption which the Board applied. See *ante*, at 789. In dicta, however, the Court questions the application of the presumption to the corridors and sitting rooms of floors occupied by patients. See *ante*, at 788–789. I do not share these sentiments.

"[T]he development of . . . presumptions is normally the function of the Board," *ante*, at 789, and its conclusions on such matters are traditionally accorded considerable deference. See *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978); *NLRB* v. *Weingarten, Inc.*, 420 U. S. 251, 266–267 (1975). *Beth Israel Hospital* v. *NLRB*, *supra*, at 500–501, made it clear that Board decisions in the health-care area are no exception to this rule. Although it is true that hospitals "give rise to unique considerations that do not apply in . . . industrial settings," and that the Board should therefore "stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized," *ante*, at 790, quoting *Beth Israel Hospital* v. *NLRB*, *supra*, at 508, it is also true that the Board has shown itself to be sensitive to the difference between the hospital and the industrial work-

place. Indeed, the very presumption at issue in this case reflects that sensitivity. As the Court itself notes:

> "Because its usual presumption that rules against solicitation on nonwork time are invalid gives too little weight to the need to avoid disruption of patient care and disturbance of patients in the hospital setting, the Board has indicated that it will not regard as presumptively invalid proscriptions on solicitation in immediate patient-care areas." *Ante,* at 778.

Judges, like most of the rest of the public, experience hospitals solely as patients. It is the Board, by contrast, which confronts every day the complexities of labor relations policy in the health-care area. And it is for that reason "that the 1974 amendments vested responsibility" in the Board "for developing that policy in the health-care industry." *Beth Israel Hospital* v. *NLRB,* 437 U. S., at 501. As we explained in *Beth Israel:*

> "Here, as in many other contexts of labor policy, '[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' . . . The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Ibid.*

At this stage, I do not believe there is any warrant for second-guessing the Board's handling of its "difficult and delicate responsibility" in this sensitive area of labor-management relations.

Reporter's Note

The next page is purposely numbered 901. The numbers between 797 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM MAY 24 THROUGH JUNE 18, 1979

MAY 24, 1979

Miscellaneous Orders

No. A–1016. SPENKELINK *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Application for stay of execution, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the application for a stay of execution. Furthermore, they object because the Court announces its action without first affording them an opportunity to prepare, circulate, and file a statement in support of their view.

No. A–1017. FILARTIGA ET AL. *v.* PENA-IRALA ET AL. D. C. E. D. N. Y. Application for stay of deportation, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–1020. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* SPENKELINK. C. A. 5th Cir. Motion of the Attorney General of Florida to vacate the order entered by Honorable Elbert Parr Tuttle, Senior Judge of the United States Court of Appeals for the Fifth Circuit, on May 22, 1979, denied. MR. JUSTICE REHNQUIST reserves the right to file a written statement at a future date. [See dissenting opinion, *infra*, filed May 25, 1979.]

MR. JUSTICE REHNQUIST, dissenting.*

I cannot join the Court's unexplained denial of the State's motion to vacate the stay order entered a few minutes before

*The Court's denial of the motion took place on Thursday, May 24. Though the later action of the Court of Appeals for the Fifth Circuit in vacating the stay has robbed this Court's denial of any lasting significance,

midnight on May 22, 1979, by the Honorable Elbert P. Tuttle, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit. My difficulty with the Court's action, and with the action of Judge Tuttle in granting a stay in this case, undoubtedly stems from the six years of litigation revolving about the question of whether the State of Florida is entitled to impose the death sentence on respondent. This procedural history is set forth in detail in my May 22 in chambers opinion in which I denied respondent's application for a stay. *Post,* p. 1301. The stay occasioning the instant motion is, in my view, the product of a clear abuse of the writ of habeas corpus, and I am concerned that this Court's action implicitly sanctions the use of such tactics to frustrate the attempts of the State to effectuate the will of its citizens.

Attorneys representing defendants under sentence of death have a difficult and arduous task to perform, but in seeking stays of execution they need devote little time to the oft-litigated issue of "irreparable injury." "[D]eath is a punishment different from all other sanctions in kind rather than degree." *Woodson* v. *North Carolina,* 428 U. S. 280, 303–304 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). The irreversible nature of the penalty makes irreparable by definition any injury inflicted in violation of the United States Constitution. But because imposition of the death penalty is irreversible, I respectfully suggest that there may be a tendency on the part of individual judges or courts exercising the extraordinary-writ authority conferred upon them by 28 U. S. C. § 1651 not merely to resolve all constitutional questions fairly admitting of doubt in favor of a federal habeas petitioner under sentence of death, but to create or assume such doubts where in fact there are none.

My understanding of the principal opinions in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), *Proffitt* v. *Florida,* 428 U. S. 242

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the legal questions involved are bound to recur in later cases. I am therefore filing this opinion dissenting from the Court's action.

(1976), *Jurek* v. *Texas*, 428 U. S. 262 (1976), *Woodson* v. *North Carolina*, *supra*, and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976), is that a State whose citizens have expressed through their elected representatives and their judges and juries a will to impose the death penalty for offenses such as murder may do so if the State conforms its trial and sentencing procedures to the requirements enunciated in this Court's cases. Considering, however, that there are several hundred federal judges in the United States who have authority to issue stays under the provisions of 28 U. S. C. § 1651, even the relatively limited authority found open to the States under the Constitution in the above-cited cases could turn out, as a practical matter, to be entirely closed to them. Most, if not all, States provide for some lapse of time between the entry of a final order setting a date for execution and the date itself. Thus, the entry of a stay of execution by a federal court or judge, even though later dissolved, will generally require a State to set a new execution date, often 30 to 60 days after it is released from the constraints of the federal stay. As the new execution date approaches, new claims are conceived and, at the last minute, new stay applications are filed. Understandably, because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them, judges are inclined to grant such 11th-hour stay applications. Then, again, new execution dates must be set and the process begins anew. This now familiar pattern could in fact result in a situation where States are powerless to carry out a death sentence, even though it has been judicially determined that the sentence was imposed in complete conformity with the United States Constitution.

Thus, it can hardly be said that a State will never be injured by issuance of such last-minute stays of execution. When a State has taken all steps required by our capital cases, its will, as represented by the legislature that authorized the imposition of the death sentence and by the juries and courts that

imposed and upheld it, must be carried out. Constant and repeated frustration of the State's lawful action in such a situation is contrary to the underlying assumptions of our federal system. This Court was faced with a similar problem in *Rosenberg* v. *United States*, 346 U. S. 273 (1953). There, Mr. Justice Douglas had granted a stay of execution later found by the full Court to have been improvidently granted. The Court said:

> "This Court has the responsibility to supervise the administration of criminal justice by the federal judiciary. This includes the duty to see that the laws are not only enforced by fair proceedings, but also that the punishments prescribed by the laws are enforced with a reasonable degree of promptness and certainty. The stay which had been issued promised many more months of litigation in a case which had otherwise run its full course." *Id.*, at 287.

In the same case, Mr. Justice Clark, joined by the Chief Justice, Mr. Justice Reed, Mr. Justice Jackson, Mr. Justice Burton, and Mr. Justice Minton, stated:

> "Our liberty is maintained only so long as justice is secure. To permit our judicial processes to be used to obstruct the course of justice destroys our freedom. Over two years ago the Rosenbergs were found guilty by a jury of a grave offense in time of war. Unlike other litigants they have had the attention of this Court seven times; each time their pleas have been denied. Though the penalty is great and our responsibility heavy, our duty is clear." *Id.*, at 296.

Under the present combination of statutes and rules by which stay authority is exercised, however, a result so at odds with a government of law is by no means foreordained. This Court has authority pursuant to 28 U. S. C. § 1651 to vacate any stay granted by any other federal court or judge pursuant

to that same section. And under Rules 50 and 51 of this Court, the Circuit Justice for the Circuit in question may take any action that the full Court might take under § 1651. *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers). Vacation of a stay order that is palpably erroneous is authorized under § 1651, even though vacation of the stay would result in execution of the death sentence. See *O'Brien* v. *Brown*, 409 U. S. 1, 5 (1972).

Here, respondent has not had an opportunity to file any response to the motion to vacate the stay. Given the gravity of the consequences of vacation of the stay, only the most demonstrable and self-evident error on the part of the judge or court issuing the stay would lead me to conclude that it should be vacated. Here, the circumstances surrounding issuance of the stay convince me that such error is present.

Respondent's "Original Petition for a Writ of Habeas Corpus by a Person in State Custody," filed with Judge Tuttle six years after respondent's trial and less than nine hours before respondent was scheduled to die, alleged for the first time that respondent's trial attorney had rendered ineffective assistance of counsel. The petition further alleged that respondent's "post-conviction attorneys," who are, incidentally, extraordinarily skilled and experienced in the area of capital punishment cases, rendered ineffective assistance in failing to claim that respondent's trial counsel had been ineffective. It strains credulity to suppose that six years and countless courthouses after his trial, respondent suddenly determined that his trial attorney had been ineffective. Either he does not believe the claim himself or he had held the claim in reserve, an insurance policy of sorts, to spring on the federal judge of his choice if all else fails. This Court has disapproved of such tactics before:

> "Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted

two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders* v. *United States,* 373 U. S. 1, 18 (1963).

See also Federal Habeas Corpus Rule 9 (b).

Moreover, respondent, for unexplained but obvious reasons, presented his original petition not to the United States District Court for the Northern District of Florida, the jurisdiction in which he is detained and which had twice denied him postconviction relief, but to a Senior Circuit Judge residing several hundred miles away in Atlanta, Ga. Title 28 U. S. C. § 2242, designed to deter such forum shopping, requires that petitions for habeas corpus "addressed to the Supreme Court, a justice thereof or a circuit judge . . . shall state the reasons for not making application to the district court of the district in which the applicant is held." Nowhere in respondent's original petition is such an allegation made.

For the foregoing reasons, I am compelled to dissent from the Court's denial of the State's motion.

MAY 25, 1979*

Miscellaneous Order

No. A–1025. SPENKELINK *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Application for stay of execution, presented to MR. JUSTICE POWELL and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the stay. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

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*[REPORTER'S NOTE: For dissenting opinion of MR. JUSTICE REHNQUIST in No. A–1020, *Wainwright* v. *Spenkelink,* see *ante,* p. 901.]

MAY 29, 1979

Affirmed on Appeal

No. 78–1553. BEGGANS *v.* PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY ET AL.; and

No. 78–1556. BYRNE, GOVERNOR OF NEW JERSEY, ET AL. *v.* PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY ET AL. Affirmed on appeal from C. A. 3d Cir. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 590 F. 2d 514.

Appeals Dismissed

No. 78–1516. WESSEL *v.* PENNSYLVANIA STATE BOARD OF LAW EXAMINERS. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question.

No. 78–1523. FLOYD *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 575 S. W. 2d 21.

No. 78–1521. EPSTEIN ET AL. *v.* ADLER, BARISH, DANIELS, LEVIN & CRESKOFF. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 482 Pa. 416, 393 A. 2d 1175.

No. 78–6238. JACKSON *v.* MARTIN, WARDEN. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6547. STEIN *v.* ANDRESS ET AL. Appeal from Ct. Civ. App. Tex., 5th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 570 S. W. 2d 9.

No. 78–6405. LINDEN *v.* DIAL PRESS ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 584 F. 2d 973.

No. 78–6474. MURRAY *v.* NEW HAMPSHIRE ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 78–5944, *ante*, p. 95.)

Certiorari Granted—Vacated and Remanded. (See also No. 78–1060, *ante*, p. 92.)

No. 78–1. CHRYSLER CORP. *v.* GABRIELE. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979). Reported below: 573 F. 2d 949.

No. 78–53. WHIRLPOOL CORP. *v.* SIMPSON. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979). Reported below: 573 F. 2d 957.

No. 78–419. JOS. SCHLITZ BREWING CO. *v.* SMITH. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979). Reported below: 584 F. 2d 1231.

Miscellaneous Orders

No. D–169. IN RE DISBARMENT OF CARNOW. It is ordered that Donald S. Carnow, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82, Orig. NEW MEXICO *v.* TEXAS. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Certiorari Denied. (See also Nos. 78–1521, 78–6238, 78–6405, 78–6474, and 78–6547, *supra.*)

No. 78–1139. NORTH CAROLINA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 587 F. 2d 625.

No. 18–1231. ATLANTIC RICHFIELD CO. *v.* THIBODAUX, ADMINISTRATRIX. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 841.

No. 78–1263. EAST CARROLL PARISH POLICE JURY ET AL. *v.* MARSHALL. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 927.

No. 78–1310. EPPERSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 571 S. W. 2d 260.

No. 78–1346. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 572.

No. 78–1348. SHEAR *v.* UNITED STATES; and
No. 78–1388. LAMORTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 610.

No. 78–1387. MUNOZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 249.

No. 78–1403. KIRSHNER *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 234.

No. 78–1411. DEL VALLE ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 699.

No. 78–1424. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 1242.

No. 78–1452. NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 192 U. S. App. D. C. 64, 590 F. 2d 1180.

No. 78–1461. SAFEGUARD CO. ET AL. *v.* BALDWIN ET AL. Sup. Ct. Pa. Certiorari denied.

No. 78–1514. CHIROLDE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–1515. RICHARDS *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–1519. RAMEY ET AL. *v.* HARBER, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 589 F. 2d 753.

No. 78–1534. MCMAHON *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 575 S. W. 2d 453.

No. 78–1544. DUNCAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 46 N. Y. 2d 74, 385 N. E. 2d 572.

No. 78–1559. BROOKS *v.* WASHINGTON TERMINAL CO. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 131, 593 F. 2d 1285.

No. 78–1612. NELUMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 236.

No. 78–1629. PETSAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 525.

No. 78–1659. HAYES *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 225, 590 F. 2d 356.

No. 78–5263. RICHARDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 577 F. 2d 447.

No. 78–6074. PLEMONS *v.* JONES, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 840.

No. 78–6239. WILLIAMS ET AL. *v.* LEEKE, CORRECTIONS DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 1336.

No. 78–6277. MATTHEWS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 363 So. 2d 1066.

No. 78–6282. WHITEHEAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 78–6336. FIGUEROA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 841.

No. 78–6351. BELLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 593 F. 2d 487.

No. 78–6352. BAIN *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 819.

No. 78–6357. PEOPLES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 395 A. 2d 41.

No. 78–6367. CARELLI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1222.

No. 78–6380. TALBERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6383. POWERS *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 78–6387. FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 977.

No. 78–6420. FRIEDMAN *v.* AVON PRODUCTS. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 830.

No. 78–6483. THOMAS *v.* STONE, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 78–6456. THACKER *v.* ISON, FORESTRY CAMP SUPERINTENDENT; and

No. 78–6502. THACKER *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 640.

No. 78–6489. SAM *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1342.

No. 78–6490. MAXEY ET AL. *v.* MORRIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 591 F. 2d 386.

No. 78–6491. MYERS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 91 Wash. 2d 120, 587 P. 2d 532.

No. 78–6497. RINEHART *v.* DURHAM COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 590 F. 2d 330.

No. 78–6503. LOCKETT *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 337.

No. 78–6504. HOLSEY *v.* INMATE GRIEVANCE COMMISSION. Ct. Sp. App. Md. Certiorari denied.

No. 78–6508. DENNIS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–6515. DALLAS *v.* HILTON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6526. DRAGON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 270 Ind. —, 383 N. E. 2d 1046.

No. 78–6557. DINKE *v.* RIGGS NATIONAL BANK OF WASHINGTON, D. C. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 217, 593 F. 2d 1371.

No. 78–6580. MARINOFF *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1208.

No. 78–6585. TIBERIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–6607. MYERS, AKA COATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 595 F. 2d 1217.

No. 78–6608. MYERS, AKA COATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 595 F. 2d 1217.

No. 78–6613. PEERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 860.

No. 78–6617. BARNES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 395 A. 2d 404.

No. 78–6623. WALLACE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 159.

No. 78–6634. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 307.

No. 78–6636. WAUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 860.

No. 78–6643. GOULD *v.* MEMBERS OF THE NEW JERSEY DIVISION OF WATER POLICY AND SUPPLY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1212.

No. 78–1495. RIGGS *v.* LAURENS DISTRICT 56 ET AL. Sup. Ct. S. C. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 271 S. C. 463, 248 S. E. 2d 306.

JUNE 4, 1979

Affirmed on Appeal

No. 78–1396. CHARBONNET ET AL. *v.* BRADEN ET AL. Affirmed on appeal from D. C. E. D. La. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument.

Appeals Dismissed

No. 78–6486. ALEXANDER *v.* ESTELLE, CORRECTIONS DIRECTOR. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6646. AHMAD *v.* RODAK, CLERK, SUPREME COURT OF THE UNITED STATES. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 78–750. KENTUCKY *v.* BRANNON. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Whorton*, 441 U. S. 786 (1979).

No. 78–1084. KENTUCKY *v.* WILLIAMS. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Whorton*, 441 U. S. 786 (1979). Reported below: 572 S. W. 2d 162.

No. 78–1085. KENTUCKY *v.* AVERY. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Whorton*, 441 U. S. 786 (1979). Reported below: 572 S. W. 2d 162.

No. 78–1493. KENTUCKY *v.* MILLER. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Whorton*, 441 U. S. 786 (1979).

No. 78–1643. LOMBARD, SHERIFF *v.* MARCERA ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bell* v. *Wolfish*, 441 U. S. 520 (1979). MR. JUSTICE MARSHALL dissents. Reported below: 595 F. 2d 1231.

Miscellaneous Orders

No. A–958. WILLIAMS ET AL. *v.* ZBARAZ ET AL. D. C. N. D. Ill. Application for stay, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A–1012. LAMAGNA *v.* UNITED STATES. Application for writ of habeas corpus and for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 78–1453. UNITED STATES ET AL. *v.* EUGE. C. A. 8th Cir. [Certiorari granted, 441 U. S. 942.] Motion for appointment of counsel granted, and it is ordered that James W. Erwin, Esquire, of St. Louis, Mo., be appointed to serve as counsel for respondent in this case provided he applies for admission to the Bar of this Court prior to the commencement of the next Term of Court.

No. 78–1538. CALLAHAN ET AL. *v.* KIMBALL ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 78–1577. SEARS, ROEBUCK & CO. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE STEWART took no part in the consideration or decision of this order.

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 78–1549. TRANS WORLD AIRLINES, INC. *v.* ZIPES ET AL. C. A. 7th Cir. Joint motions to defer consideration of petitions for writs of certiorari granted. MR. JUSTICE STEVENS took no part in the consideration or decision of these motions. Reported below: 582 F. 2d 1142.

No. 78–6407. FAGAN *v.* ROMERO, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted

No. 78–1548. CALIFORNIA BREWERS ASSN. ET AL. *v.* BRYANT ET AL. C. A. 9th Cir. Certiorari granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 585 F. 2d 421.

No. 78–6020. BUSIC *v.* UNITED STATES; and

No. 78–6029. LAROCCA *v.* UNITED STATES. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Cases consolidated and a total of one and one-half hours allotted for oral argument. Reported below: 587 F. 2d 577.

Certiorari Denied. (See also Nos. 78–6486 and 78–6646, *supra.*)

No. 78–1249. BORING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 365 So. 2d 960.

No. 78–1325. TYLER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 147 Ga. App. 394, 249 S. E. 2d 109.

No. 78–1372. ARAMBASICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 839.

No. 78–1383. WEDELSTEDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 589 F. 2d 339.

No. 78–1412. JAMES *v.* UNITED STATES;
No. 78–6369. SMITH *v.* UNITED STATES; and
No. 78–6431. WHITMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 575.

No. 78–1414. ROBESON *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied.

No. 78–1420. GRUMMAN AEROSPACE CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 218 Ct. Cl. 441, 587 F. 2d 498.

No. 78–1444. DECARLO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: 162 N. J. Super. 174, 392 A. 2d 615.

No. 78–1463. ARNONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1225.

No. 78–1465. SAHARA-TAHOE CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 581 F. 2d 767.

No. 78–1467. MIDTAUNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 589 F. 2d 370.

No. 78–1474. FIELDS ET AL. *v.* UNITED STATES;
No. 78–1480. DAVIS *v.* UNITED STATES; and
No. 78–1483. FRIEDMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 F. 2d 638.

No. 78–1477. FORMICA CORP. *v.* LEFKOWITZ ET AL. C. C. P. A. Certiorari denied. Reported below: 590 F. 2d 915.

No. 78–1484. RUBY CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 697.

No. 78–1491. UNITED TELECOMMUNICATIONS, INC., FORMERLY UNITED UTILITIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 589 F. 2d 1383.

No. 78–1502. SOLVINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–1537. FORMAN *v.* WOLFF ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 2d 283.

No. 78–1542. AUTOMOBILE CLUB OF MICHIGAN ET AL. *v.* BELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 587.

No. 78–1554. BELL *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1334.

No. 78–1560. AVEDISIAN *v.* HUBBARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1347.

No. 78–1564. BEAUMONT *v.* MICHIGAN DEPARTMENT OF LABOR ET AL. Ct. App. Mich. Certiorari denied.

No. 78–1566. LONG'S HAULING CO., INC. *v.* HUGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 590 F. 2d 457.

No. 78–1575. LIBERTARIAN PARTY OF ILLINOIS *v.* BOARD OF ELECTION COMMISSIONERS OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 591 F. 2d 22.

No. 78–1582. HARRIS *v.* INAHARA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 451.

No. 78–1591. PAULINSKI ET AL. *v.* ISAAC ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 483 Pa. 467, 397 A. 2d 760.

No. 78–1600. WELLS *v.* PIONEER WEAR, INC. C. A. 10th Cir. Certiorari denied.

No. 78–1601. MANUFACTURERS SYSTEMS, INC. *v.* ADM INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 338.

No. 78–1603. Goss *v.* Revlon, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1330.

No. 78–1613. Air Transport Lodge 1894, International Association of Machinists & Aerospace Workers, AFL–CIO, et al. *v.* Turner. C. A. 2d Cir. Certiorari denied. Reported below: 590 F. 2d 409.

No. 78–1649. Fleener *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 78–1660. U. S. Labor Party *v.* Whitman. Ct. Sp. App. Md. Certiorari denied.

No. 78–1666. Crespo et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 592 F. 2d 1219.

No. 78–1675. Lujan et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 436.

No. 78–1678. Bomher *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–1712. Rose *v.* Carter, President of the United States, et al. C. A. D. C. Cir. Certiorari denied.

No. 78–6237. Phillips *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 365 So. 2d 1304.

No. 78–6264. Rehbein *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 435, 386 N. E. 2d 39.

No. 78–6322. Hill *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 589 F. 2d 1344.

No. 78–6329. Kirkham *v.* Overberg, Correctional Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–6345. Harbolt *v.* Hanberry, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 332.

No. 78–6362. QUINONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–6368. STEINKOETTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6384. DEFILLIPO *v.* UNITED STATES; and
No. 78–6411. DEFILLIPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 590 F. 2d 1228.

No. 78–6391. VALENZUELA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6397. OROZCO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 2d 789.

No. 78–6517. JOINER *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 591 F. 2d 65.

No. 78–6527. TUBBS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 78–6528. HOSKINSON *v.* ENGLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1223.

No. 78–6530. CHASE *v.* REDMAN, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1334.

No. 78–6538. WILLIAMS *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 169.

No. 78–6540. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 78–6541. REECE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 78–6542. WELCH *v.* FALKE, MONTGOMERY COUNTY PROSECUTING ATTORNEY. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 865.

No. 78–6545. KELSO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 95 Nev. 37, 588 P. 2d 1035.

No. 78–6556. BOOTHE *v.* GREATER NEW YORK SAVINGS BANK. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1208.

No. 78–6630. WITH HORN *v.* UNITED STATES; and
No. 78–6631. WOUNDED KNEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 596 F. 2d 790.

No. 78–6640. MCMAHON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 871.

No. 78–6648. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 877.

No. 78–6658. MOREE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–1379. TAHOE NUGGET, INC., DBA JIM KELLEY'S TAHOE NUGGET, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 584 F. 2d 293.

No. 78–1529. HUNT ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would grant certiorari. Reported below: 591 F. 2d 1234.

No. 78–1558. IOWA BEEF PROCESSORS, INC., ET AL. *v.* HAWKINS ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 596 F. 2d 254.

No. 78–1650. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, SILVERGATE DISTRICT LODGE 50 *v.* ANDERSON. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 589 F. 2d 397.

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No. 78–6067. GOULDEN *v.* OLIVER ET AL. C. A. 5th Cir. Certiorari denied.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner Dudley Dee Goulden asserts that he is an Orthodox Jew, and that the Alabama prison authorities have forced him to shave and cut his hair, which is contrary to his religious beliefs. He filed this suit under 42 U. S. C. § 1983 alleging that the prison's grooming regulations violated his rights under the First and Fourteenth Amendments. The District Court dismissed his complaint, reasoning that the prison regulations promoted cleanliness and personal identification and that those valid objectives outweighed any religious freedom petitioner was entitled to enjoy under the Constitution. By a single-judge order and without opinion, the United States Court of Appeals for the Fifth Circuit denied petitioner's *pro se* application for leave to appeal *in forma pauperis*. To support these rulings, respondents rely on *Brooks* v. *Wainwright*, 428 F. 2d 652 (CA5 1970), which upheld the dismissal of a somewhat similar complaint.[1] See also *Brown* v. *Wainwright*, 419 F. 2d 1376 (CA5 1970).

In *Cruz* v. *Beto*, 405 U. S. 319 (1972), this Court held that a complaint that challenged restrictions on an inmate's practice of Buddhism stated a claim upon which relief could be granted. Ruling that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty," *id.*, at 322 n. 2, the Court remanded the case for a hearing on the merits. See also *Cooper* v. *Pate*, 378 U. S. 546 (1964).

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[1] The District Court cited three decisions involving personal lifestyle claims. *Hill* v. *Estelle*, 537 F. 2d 214 (CA5 1976); *Rinehart* v. *Brewer*, 491 F. 2d 705 (CA8 1974); *Daugherty* v. *Reagan*, 446 F. 2d 75 (CA9 1971). None of these, however, dealt with religious rights under the Free Exercise Clause. *Hill* did discuss *Brooks*.

Whatever validity the Fifth Circuit's *Brooks* rule may once have had, it has been severely undercut by *Cruz* and the subsequent cases that have reaffirmed the principle that prison regulations are subject to constitutional scrutiny. See *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119 (1977); *Bounds* v. *Smith*, 430 U. S. 817 (1977); *Procunier* v. *Martinez*, 416 U. S. 396 (1974). Citing *Cruz* and *Martinez*, the Second Circuit has rejected *Brooks* and held that a prisoner challenging prison grooming regulations on free exercise grounds is entitled to a hearing on the reasonableness of the prison's regulations. *Burgin* v. *Henderson*, 536 F. 2d 501, 504, and n. 8 (1976). Accord: *Jihaad* v. *Carlson*, 410 F. Supp. 1132, 1134 (ED Mich. 1976); *Wright* v. *Raines*, 1 Kan. App. 2d 494, 500–501, 571 P. 2d 26, 31–32 (1977), cert. denied, 435 U. S. 933 (1978). Similarly, the Eighth Circuit has rejected the contention that such regulations are valid as a matter of law, and has affirmed a decision finding violative of the Free Exercise Clause an Iowa rule that prevented an American Indian prisoner from wearing long braided hair. *Teterud* v. *Burns*, 522 F. 2d 357, 362 (1975) (rejecting language in *Proffitt* v. *Ciccone*, 506 F. 2d 1020 (CA8 1974)). Other courts have upheld similar free exercise claims. See *Wright* v. *Raines*, 457 F. Supp. 1082 (Kan. 1978); *Moskowitz* v. *Wilkinson*, 432 F. Supp. 947 (Conn. 1977) (Orthodox Jew); *Monroe* v. *Bombard*, 422 F. Supp. 211, 217–218 (SDNY 1976); *Maguire* v. *Wilkinson*, 405 F. Supp. 637 (Conn. 1975).

While a decision based on evidentiary proof may well result in a finding that petitioner's religious beliefs are not sincere,[2] or that the State's interests are sufficient to justify the restriction imposed on petitioner's professed religious practice, I am

[2] Respondents, citing two suits in which other allegations made by petitioner proved untrue, contend that the District Court could have dismissed the complaint as an abuse of process. Respondents, however, do not challenge the facts as stated by petitioner, and do not contend that the question presented has been previously litigated. The District Court's opinion rejects petitioner's claim on the merits and does not question his good faith.

not yet prepared to say that there is no set of facts that would entitle him to relief. I would permit petitioner to proceed *in forma pauperis*, grant the petition, vacate the order of the Court of Appeals, and remand the case with instructions to allow petitioner an adjudication on the merits of his complaint.

No. 78–6187. MUNIZ *v.* TEXAS. Ct. Crim. App. Tex; and No. 78–6500. WAYE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 78–6187, 573 S. W. 2d 792; No. 78–6500, 219 Va. 683, 251 S. E. 2d 202.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 78–6549. GULLY ET AL. *v.* KUNZMAN, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 592 F. 2d 283.

Rehearing Denied

No. 78–1284. BUB DAVIS PACKING CO., INC. *v.* UNITED STATES, 441 U. S. 931;

No. 78–1367. COOK *v.* MUSKINGUM WATERSHED CONSERVANCY DISTRICT, 441 U. S. 924; and

No. 78–6472. DiSILVESTRO *v.* VETERANS' ADMINISTRATION, 441 U. S. 936. Petitions for rehearing denied.

No. 78–6206. MUNDY *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS, TAZEWELL, VIRGINIA, 441 U. S. 910. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 78–5950. HAYWOOD *v.* ILLINOIS, 440 U. S. 948. Motion for leave to file petition for rehearing denied.

JUNE 5, 1979

Dismissal Under Rule 60

No. 78–874. ROTH ET AL. *v.* BANK OF THE COMMONWEALTH. C. A. 6th Cir. [Certiorari granted, 440 U. S. 944.] Writ of certiorari dismissed under this Court's Rule 60. Reported below: 583 F. 2d 527.

JUNE 11, 1979

Appeals Dismissed

No. 78–1482. MEYERS *v.* CHILCOTE. Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–1590. JONES *v.* COMMITTEE OF LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR. Appeal from Sup. Ct. App. W. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6553. LUPERT *v.* COLLEGE OF LAW OF SYRACUSE UNIVERSITY. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6581. CROSS *v.* CHURCH, COUNTY CLERK-RECORDER OF SAN MATEO COUNTY, ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 77–6855. HARDWICK *v.* REESE. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for

further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. Reported below: 573 F. 2d 83.

No. 78–950. MISSOURI BOARD OF PROBATION AND PAROLE ET AL. *v.* WILLIAMS ET AL. C. A. 8th Cir. Motion of respondent Williams for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. Reported below: 585 F. 2d 922.

No. 78–1282. WILLIAMS ET AL. *v.* PHILLIPS. Sup. Ct. Okla. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. Reported below: 583 P. 2d 488.

No. 78–1533. CONNECTICUT BOARD OF PARDONS ET AL. *v.* DUMSCHAT ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. Reported below: 593 F. 2d 165.

No. 78–5419. VAN CUREN *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. Reported below: 578 F. 2d 1382.

No. 78–5551. SMITH *v.* WOODARD ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. Reported below: 584 F. 2d 978.

Miscellaneous Orders

No. A–1042. REGA *v.* CURIOS, CORRECTION COMMISSIONER. C. A. 2d Cir. Application for stay of execution of sentence, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the application.

No. D–158. IN RE DISBARMENT OF HERMAN. Disbarment entered. [For earlier order herein, see 440 U. S. 933.]

No. 78–432. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* WEBER ET AL.;

No. 78–435. KAISER ALUMINUM & CHEMICAL CORP. *v.* WEBER ET AL.; and

No. 78–436. UNITED STATES ET AL. *v.* WEBER ET AL. C. A. 5th Cir. [Certiorari granted, 439 U. S. 1045.] Motion of Rudy Gorden et al. for leave to intervene and for an order vacating the judgment below and remanding cases for a new trial with intervenors as party defendants, denied. MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 78–1143. VANCE, SECRETARY OF STATE *v.* TERRAZAS. C. A. 7th Cir. [Probable jurisdiction noted, 440 U. S. 970.] Motion of the Solicitor General to dispense with printing appendix granted.

No. 78–1202. CHIARELLA *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, 441 U. S. 942.] Motion of petitioner to dispense with printing appendix granted.

No. 78–1604. CENTRAL MACHINERY CO. *v.* ARIZONA STATE TAX COMMISSION. Sup. Ct. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 78–6604. RAITPORT *v.* CLERK OF THE SUPREME COURT OF THE UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

No. 78–1611. REICHEL *v.* SUPREME COURT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 78–6609. FRANKS *v.* DELAWARE. Motion for leave to file petition for writ of mandamus and/or petition for writ of certiorari denied.

Probable Jurisdiction Noted

No. 78–1369. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* REGAN, COMPTROLLER OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 461 F. Supp. 1123.

No. 78–1588. VANCE ET AL. *v.* UNIVERSAL AMUSEMENT CO., INC., ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 587 F. 2d 159.

Certiorari Granted

No. 78–1472. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* PACIFIC LEGAL FOUNDATION ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 586 F. 2d 650.

No. 78–1522. ANDRUS, SECRETARY OF THE INTERIOR *v.* UTAH. C. A. 10th Cir. Certiorari granted. Reported below: 586 F. 2d 756.

Certiorari Denied. (See also Nos. 78–1482, 78–1590, 78–6553, and 78–6581, *supra.*)

No. 78–910. OCCIDENTAL OF UMM AL QAYWAYN, INC. *v.* CITIES SERVICE OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 1196.

No. 78–1328. BEECH AIRCRAFT CORP. *v.* BRABAND ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 72 Ill. 2d 548, 382 N. E. 2d 252.

No. 78–1334. WEISS *v.* PATRICK ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 588 F. 2d 818.

No. 78–1338. COLEMAN-AMERICAN COS., INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 869.

No. 78–1344. VRINER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 329, 385 N. E. 2d 671.

No. 78–1357. BASCIANO *v.* HERKIMER, EXECUTIVE DIRECTOR, NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 605.

No. 78–1366. COSTELLO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 424.

No. 78–1428. BUTLER, DISTRICT ATTORNEY OF BEXAR COUNTY, ET AL. *v.* DEXTER. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 176.

No. 78–1435. LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* GTE-AUTOMATIC ELECTRIC CO. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 839.

No. 78–1440. ROSE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 232.

No. 78–1479. PEOPLES *v.* JUDICIAL STANDARDS COMMISSION OF NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 296 N. C. 109, 250 S. E. 2d 890.

No. 78–1492. GUTTMAN, T/A LIBERTY NURSING CENTER *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1335.

No. 78–1500. CITICORP *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 2d Cir. Certiorari denied. Reported below: 589 F. 2d 1182.

No. 78–1541. HOWELL *v.* GATES ET AL. Ct. App. Colo. Certiorari denied.

No. 78–1576. TEXAS STATE OPTICAL CO. ET AL. *v.* ROYAL INTERNATIONAL OPTICAL CO., DBA TEXAS OPTICAL. Ct. App. N. M. Certiorari denied. Reported below: 92 N. M. 237, 586 P. 2d 318.

No. 78–1579. CHARTER ET AL. *v.* OHIO. Ct. App. Ohio, Highland County. Certiorari denied.

No. 78–1580. BROOKS ET AL. *v.* ANKER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1208.

No. 78–1587. LEVESON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 361 So. 2d 764.

No. 78–1589. TOM BENSON CHEVWAY RENTAL & LEASING, INC. *v.* ALLEN ET UX. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. Reported below: 571 S. W. 2d 346.

No. 78–1598. CLARK, COUNTY EXECUTIVE, ET AL. *v.* O'BRIEN, JUDGE, ET AL. Sup. Ct. N. J. Certiorari denied.

No. 78–1599. SIMPSON ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 366 So. 2d 1085.

No. 78–1605. JACOBSON ET AL. *v.* ROSE, DISTRICT ATTORNEY OF WASHOE COUNTY, NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 515.

No. 78–1615. GRAYHILL, INC. *v.* AMF INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1335.

No. 78–1683. O'HAIR ET AL. *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1144.

No. 78–1728. SOTO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1091.

No. 78–6236. EDWARDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 1, 383 N. E. 2d 944.

No. 78–6286. STOWE *v.* DEVOY, U. S. MARSHAL. C. A. 2d Cir. Certiorari denied. Reported below: 588 F. 2d 336.

No. 78–6287. LUNDY *v.* WARDEN, EL RENO FEDERAL CORRECTIONAL INSTITUTION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6294. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–6335. FLEMING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 598.

No. 78–6337. BRENNEMAN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 264 Ark. 460, 573 S. W. 2d 47.

No. 78–6422. SEWARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 855.

No. 78–6428. MINER *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 1271.

No. 78–6437. POWERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 78–6447. BREEST *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 118 N. H. 416, 387 A. 2d 643.

No. 78–6450. LYMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 496.

No. 78–6466. GRANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–6496. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 855.

No. 78–6524. GREEN *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6548. JOHNSON *v.* MEACHAM, WARDEN. Sup. Ct. Wyo. Certiorari denied. Reported below: 592 P. 2d 285.

No. 78–6551. WELLS *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 276 N. W. 2d 679.

No. 78–6555. SANDOVAL *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 590 P. 2d 346.

No. 78–6564. BAKER *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 78–6566. FERNANDEZ *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 78–6571. NAJERA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–6575. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–6576. WATKINS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 377 Mass. 385, 385 N. E. 2d 1387.

No. 78–6586. HARRELL *v.* HUFF, ASSISTANT HOSPITAL ADMINISTRATOR, ET AL. C. A. 10th Cir. Certiorari denied.

No. 78–6600. KANTORSKI ET AL. *v.* COMMISSIONER OF CORPORATIONS AND TAXATION OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 595 F. 2d 1206.

No. 78–6618. COOK *v.* HANBERRY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 658.

No. 78–6622. WILLIAMS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 575 S. W. 2d 948.

No. 78–6625. Ho Yin Wong *v.* Bell, Attorney General, et al. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 100.

No. 78–6628. Silvers *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 593.

No. 78–6632. Homel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1230.

No. 78–6642. Rodriguez *v.* Secretary of Health, Education, and Welfare. C. A. 1st Cir. Certiorari denied. Reported below: 595 F. 2d 1206.

No. 78–6667. Sullivan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 7.

No. 78–6672. Killebrew *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 1103.

No. 78–6673. Farris *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 101.

No. 78–6674. Cox *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 243.

No. 78–6675. Apostol *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 595.

No. 78–6682. Nolen *v.* Brown, Secretary of Defense. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1189.

No. 78–6698. Fortes *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 610.

No. 78–6705. Holland *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6707. Ramos-Chacon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 1389.

No. 78–1390. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* CLAIBORNE ET AL. C. A. 5th Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 583 F. 2d 143.

No. 78–1583. ALLSTATE INSURANCE CO. *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL. Sup. Ct. Mich. Motion of National Association of Independent Insurers et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 402 Mich. 554, 267 N. W. 2d 72.

No. 78–1610. UNITED AIR LINES, INC. *v.* MCDONALD. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 587 F. 2d 357.

No. 78–1618. SOUTHERN RAILWAY CO. ET AL. *v.* YAWN ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 591 F. 2d 312.

No. 78–6375. FERGUSON *v.* TEXAS. Ct. Crim. App. Tex.;

No. 78–6462. REDD *v.* GEORGIA. Sup. Ct. Ga.; and

No. 78–6561. YOUNG *v.* ZANT, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 78–6375, 573 S. W. 2d 516; No. 78–6462, 242 Ga. 876, 252 S. E. 2d 383; No. 78–6561, 242 Ga. 559, 250 S. E. 2d 404.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78–707. ATKINS *v.* LOUISIANA, 441 U. S. 927;
No. 78–1385. LEBOWITZ *v.* FLORIDA, 441 U. S. 932;
No. 78–1473. PACKARD *v.* CITY OF VALLEJO, 441 U. S. 933;
No. 78–6316. GIBSON *v.* LOUISIANA, 441 U. S. 926; and
No. 78–6425. GORDON *v.* UNITED STATES, 441 U. S. 936. Petitions for rehearing denied.

No. 78–1236. ARNOLD ET UX. *v.* JOHNSON ET AL., 440 U. S. 981; and
No. 78–6082. THORNTON *v.* UNITED STATES, 440 U. S. 983. Motions for leave to file petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

JUNE 18, 1979

Appeals Dismissed

No. 78–1527. LUNA *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeal from C. A. 1st Cir. dismissed for want of substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 588 F. 2d 817.

No. 78–6409. BELLO *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–1546. MONTANA CONTRACTORS' ASSN. ET AL. *v.* KREPS, SECRETARY OF COMMERCE, ET AL. Appeal from D. C. Mont. dismissed for want of jurisdiction. Reported below: 460 F. Supp. 1174.

No. 78–1626. ROSENBAUM *v.* ROSENBAUM. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 65 Ill. App. 3d 228, 382 N. E. 2d 270.

No. 78–1684. FAHEY, DBA CASTLE REST NURSING HOME *v.* HYNES, DEPUTY ATTORNEY GENERAL OF NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of substantial federal question. Reported below: 63 App. Div. 2d 1119, 406 N. Y. S. 2d 712.

Vacated and Remanded on Appeal

No. 78–931. BABBITT, GOVERNOR OF ARIZONA, ET AL. *v.* UNITED FARM WORKERS NATIONAL UNION ET AL. Appeal from D. C. Ariz. Judgment vacated and case remanded for further consideration in light of *Babbitt* v. *Farm Workers, ante,* p. 289. Reported below: 449 F. Supp. 449.

Certiorari Granted—Vacated and Remanded

No. 78–5693. ROSS *v.* BYRD ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS dissent. Reported below: 586 F. 2d 838.

No. 78–6095. GRIFFITH *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS dissent.

No. 78–6232. WHITE *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greenholtz* v. *Nebraska Penal Inmates, ante,* p. 1. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, MR. JUSTICE REHNQUIST, and Mr. JUSTICE STEVENS dissent.

Miscellaneous Orders

No. A–1026. UNIVERSITY OF TENNESSEE ET AL. *v.* GEIER ET AL.; and

No. A–1051. TENNESSEE HIGHER EDUCATION COMMISSION *v.* GEIER ET AL. C. A. 6th Cir. Applications for stay, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these applications.

No. A–1067. HENRY ET AL. *v.* MISSISSIPPI. D. C. D. C. Application for stay, or in the alternative for advancement of appeal, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–166. IN RE DISBARMENT OF KAUFMAN. Disbarment entered. [For earlier order herein, see 441 U. S. 920.]

No. 27, Orig. OHIO *v.* KENTUCKY. Exceptions to Report of Special Master set for oral argument in due course. [For earlier order herein, see, *e. g.*, 439 U. S. 1123.]

No. 67, Orig. IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. Exceptions to Report of Special Master set for oral argument in due course. [For earlier order herein, see, *e. g.*, 440 U. S. 943.]

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion for leave to file bill of complaint granted and defendant shall have 60 days to answer.

No. 84, Orig. UNITED STATES *v.* ALASKA. Motion for leave to file bill of complaint granted and defendant shall have 60 days to answer.

No. 77–1724. BURKS ET AL. *v.* LASKER ET AL., 441 U. S. 471. Motion of respondents to be relieved of costs denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 78–253. ESTES ET AL. *v.* METROPOLITIAN BRANCHES OF THE DALLAS NAACP ET AL.;

No. 78–282. CURRY ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL.; and

No. 78–283. BRINEGAR ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL. C. A. 5th Cir. [Certiorari granted, 440 U. S. 906.] Motion of Dallas Alliance et al. for leave to file a brief as *amici curiae* granted. Motion of petitioners Brinegar et al. for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 78–630. WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION ET AL.; and WASHINGTON *v.* UNITED STATES ET AL. D. C. E. D. Wash. [Probable jurisdiction postponed, 440 U. S. 905.] Motion of the Solicitor General for additional time for oral argument granted, and 15 additional minutes allotted to the appellees. Appellants also allotted 15 additional minutes for oral argument.

No. 78–857. NATIONAL LABOR RELATIONS BOARD *v.* YESHIVA UNIVERSITY; and

No. 78–997. YESHIVA UNIVERSITY FACULTY ASSN. *v.* YESHIVA UNIVERSITY. C. A. 2d Cir. [Certiorari granted, 440 U. S. 906.] Motion of the Solicitor General for divided argument granted.

No. 78–911. INDUSTRIAL UNION DEPARTMENT, AFL–CIO *v.* AMERICAN PETROLEUM INSTITUTE ET AL.; and

No. 78–1036. MARSHALL, SECRETARY OF LABOR *v.* AMERICAN PETROLEUM INSTITUTE ET AL. C. A. 5th Cir. [Certiorari granted, 440 U. S. 906.] Motion of the Solicitor General for additional time for oral argument granted, and 15 additional minutes allotted to petitioners. Respondents also allotted 15 additional minutes for oral argument.

No. 78–952. RUSH ET AL. *v.* SAVCHUK. Sup. Ct. Minn. [Probable jurisdiction noted, 440 U. S. 905.] Motion of New York State Trial Lawyers Assn. for leave to file a brief as *amicus curiae* denied.

No. 78–1183. CARBON FUEL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 4th Cir. [Certiorari granted, 440 U. S. 957.] Motions of Chamber of Commerce of the United States, Washington Legal Foundation, and Bituminous Coal Operators' Association, Inc., for leave to file briefs as *amici curiae* granted.

No. 78–1418. BLOOMER *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 2d Cir. [Certiorari granted, 441 U. S. 942.] Motion of petitioner to dispense with printing appendix granted.

No. 78–1653. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION ET AL. *v.* EASTERN BAND OF CHEROKEE INDIANS. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 78–5705. TRAMMEL *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 440 U. S. 934.] Motion of Michigan Bar Association Standing Committee on Civil Procedure for leave to file a brief as *amicus curiae* granted.

No. 78–6386. RUMMEL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. [Certiorari granted, 441 U. S. 960.] Motion for appointment of counsel granted, and it is ordered that Scott J. Atlas, Esquire, of Houston, Tex., be appointed to serve as counsel for petitioner in this case.

No. 78–6748. FRIED *v.* WARDEN, NEW YORK STATE CORRECTIONAL FACILITY AT ELMIRA, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted

No. 78–1595. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. Reported below: 591 F. 2d 978.

No. 78–1651. SEATRAIN SHIPBUILDING CORP. ET AL. *v.* SHELL OIL CO. ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 194 U. S. App. D. C. 7, 595 F. 2d 814.

No. 78–1756. UNITED STATES *v.* MITCHELL ET AL. Ct. Cl. Certiorari granted. Reported below: 219 Ct. Cl. 95, 591 F. 2d 1300.

No. 78–1261. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. *v.* GREEN, ADMINISTRATRIX. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 581 F. 2d 669.

No. 78–1487. FORD MOTOR CREDIT CO. ET AL. *v.* MILHOLLIN ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 588 F. 2d 753.

No. 78–1557. NACHMAN CORP. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. C. A. 7th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 592 F. 2d 947.

Certiorari Denied. (See also Nos. 78–1527 and 78–6409, *supra.*)

No. 78–1303. CHISNELL *v.* CHISNELL. Ct. App. Mich. Certiorari denied. Reported below: 82 Mich. App. 699, 267 N. W. 2d 155.

No. 78–1397. MALLERY *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 364 So. 2d 1283.

No. 78–1457. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1353.

No. 78–1486. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 481.

No. 78–1505. GIACALONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 F. 2d 5.

No. 78–1524. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1046.

No. 78–1535. BROWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 345.

No. 78–1536. HART ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 1280.

No. 78–1550. THOMAS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 78–1552. COHRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1342.

No. 78–1555. MUNIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–1578. LOSEGO ET AL. *v.* GUERNSEY COUNTY BOARD OF EDUCATION ET AL. Ct. App. Ohio, Guernsey County. Certiorari denied.

No. 78–1592. SHARON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1273.

No. 78–1593. HINCHMAN *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 196 Colo. 526, 589 P. 2d 917.

No. 78–1619. MOSHER *v.* SAALFELD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 438.

No. 78–1621. VESCO *v.* INTERNATIONAL CONTROLS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 593 F. 2d 166.

No. 78–1622. HIGHSAW *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 458, 381 N. E. 2d 470.

No. 78–1630. CONSOLIDATED RAIL CORP. *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 589 F. 2d 1327.

No. 78–1635. TIVIAN LABORATORIES, INC. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 589 F. 2d 49.

No. 78–1636. GOICHMAN *v.* DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 78–1640. BELL & HOWELL CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 217, 598 F. 2d 136.

No. 78–1645. DAVIS ET AL., TRUSTEES *v.* PIMA COUNTY, ARIZONA, ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 121 Ariz. 343, 590 P. 2d 459.

No. 78–1655. INSURANCE COMPANY OF NORTH AMERICA *v.* FARMER'S HOME MUTUAL INSURANCE CO. Ct. App. Wash. Certiorari denied. Reported below: 20 Wash. App. 815, 583 P. 2d 644.

No. 78–1657. PENNSYLVANIA HUMAN RELATIONS COMMISSION *v.* PITTSBURGH PRESS CO. Sup. Ct. Pa. Certiorari denied. Reported below: 483 Pa. 314, 396 A. 2d 1187.

No. 78–1664. ALLUSTIARTE ET UX. *v.* PETERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 242.

No. 78–1680. WASHINGTON *v.* NORTON MANUFACTURING CO. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 441.

No. 78–1703. FREEDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1229.

No. 78–1704. California Inspection Rating Bureau *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 56.

No. 78–1713. Alston *v.* Allegheny-Ludlum Steel Corp., a Division of Allegheny-Ludlum Industries, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 854.

No. 78–1718. Poe *v.* Kuyk et al. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1336.

No. 78–1723. States Steamship Co. et al. *v.* Zirpoli, U. S. District Judge (R. J. Reynolds Tobacco Co. et al., Real Parties in Interest). C. A. 9th Cir. Certiorari denied.

No. 78–1735. Fabsteel Company of Louisiana *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 689.

No. 78–1736. Migely *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 596 F. 2d 511.

No. 78–1750. Tussel *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–1762. Gonzalez-Perez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 1283.

No. 78–1763. McBrearty *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 78–1772. United Artists Corp. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 216.

No. 78–5996. Anzaldua *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–6396. Farmer *v.* United States Parole Commission. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 54.

No. 78–6432. ROBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 592 F. 2d 406.

No. 78–6459. GAINES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 541.

No. 78–6468. HANER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 243.

No. 78–6469. CLARK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 394 A. 2d 1.

No. 78–6480. SNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 1083.

No. 78–6482. AGEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 597 F. 2d 350.

No. 78–6488. DELPIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 593 F. 2d 539.

No. 78–6495. STINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 242.

No. 78–6505. NOLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 865.

No. 78–6516. DARBY ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1547, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 1379.

No. 78–6521. SIGGERS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–6532. COLON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 867.

No. 78–6589. BURSON *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1222.

No. 78–6591. TRICE *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 575 S. W. 2d 739.

No. 78–6594. MATTINGLY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6599. PARRIS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 78–6602. HELLER *v.* CONSOLIDATED RAIL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 854.

No. 78–6606. TONEMAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–6610. WILSON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 1185.

No. 78–6616. ALEXANDER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 65 Ill. App. 3d 559, 382 N. E. 2d 519.

No. 78–6619. WIENER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–6666. COLLINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 854.

No. 78–6690. BROWN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–6708. WALTERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1195.

No. 78–6713. WOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6715. KRIZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 1178.

No. 78–6720. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 596 F. 2d 44.

No. 78–6724. REEVES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 536.

No. 78–6725. RISCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–6726. HOWARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6734. DOLLIOLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 597 F. 2d 102.

No. 78–6746. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6747. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1325.

No. 78–25. BROKENLEG *v.* BUTTS ET UX. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Motions of Rosebud Sioux Tribe, American Academy of Child Psychiatry, and National Indian Youth Council, Inc., et al., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 559 S. W. 2d 853.

No. 78–685. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Motions of PPG Industries, Fort Howard Paper Co., and Allied Chemical Corp. et al. for leave to intervene denied. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions and this petition.

No. 78–1399. CHICAGO-MIDWEST MEAT ASSN. *v.* CITY OF EVANSTON ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 589 F. 2d 278.

No. 78–1454. TRAGESER *v.* LIBBIE REHABILITATION CENTER, INC., T/A LIBBIE CONVALESCENT HOME. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 590 F. 2d 87.

No. 78–1470. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 588 F. 2d 450.

No. 78–1688. CITY COUNCIL OF THE CITY OF PHILADELPHIA ET AL. *v.* RESIDENT ADVISORY BOARD OF PHILADELPHIA ET AL. C. A. 3d Cir. Motion of respondent Nellie Reynolds for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 595 F. 2d 1211.

No. 78–6699. GOODWIN *v.* HOPPER, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 193, 253 S. E. 2d 156.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 78–385. VOLPE ET AL. *v.* UNITED STATES, 441 U. S. 930;

No. 78–1179. GRANT ET AL. *v.* UNITED STATES, 441 U. S. 931;

No. 78–1222. WESTERN COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., 441 U. S. 931; and

No. 78–1437. GOTTESMAN ET AL. *v.* GENERAL MOTORS CORP. ET AL., 441 U. S. 932. Petitions for rehearing denied.

No. 78–6204. CLAYTON *v.* UNITED STATES, 441 U. S. 962;
No. 78–6318. APONTE *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 441 U. S. 934; and
No. 78–6416. HARRISON *v.* ILLINOIS ET AL., 441 U. S. 949.
Petitions for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 948 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

SPENKELINK *v.* WAINWRIGHT ET AL.

ON APPLICATION FOR STAY OF EXECUTION

No. A–1016. Decided May 22, 1979

An application for stay of execution of a death sentence for murder imposed by a Florida court is denied. This Court on three earlier occasions has refused to review determinations by the state courts and by lower federal courts in habeas corpus proceedings that there was no federal constitutional error in the process by which applicant was sentenced to death. And it appears unlikely that four Justices of this Court would vote to grant certiorari either to hear the constitutional claims previously presented by applicant or to review the denial in federal habeas proceedings of his new claim that the State's failure to accord him adequate notice of the aggravating circumstances alleged as the basis for seeking the death penalty denied him rights secured by the Eighth and Fourteenth Amendments.

MR. JUSTICE REHNQUIST, Circuit Justice.

This application for stay has come to me by reason of the unavailability of MR. JUSTICE POWELL. On December 20, 1973, following a trial and jury verdict, applicant was sentenced to death pursuant to the Florida statute that we upheld in *Proffitt* v. *Florida*, 428 U. S. 242 (1976), for a murder committed in February 1973. On applicant's appeal, the Supreme Court of Florida affirmed both the conviction and sentence, *Spenkelink* v. *State*, 313 So. 2d 666 (1975), and this Court denied certiorari. 428 U. S. 911 (1976). Applicant next sought executive clemency from the Governor of Florida, but his request for that relief was denied on September 12, 1977, and at the same time the Governor signed a death warrant setting applicant's execution for 8:30 a. m. on September 19, 1977. The following day, applicant filed a motion

for collateral relief in the Florida trial court that had convicted him; this motion, too, was denied, the Supreme Court of Florida affirmed its denial, *Spenkelink* v. *State,* 350 So. 2d 85 (1977), and we again denied certiorari. 434 U. S. 960 (1977).

One day after he filed his petition for collateral relief in state court, however, applicant filed a petition for federal habeas corpus in the United States District Court for the Middle District of Florida, which transferred the case to the Northern District of Florida. That court stayed the execution and scheduled an evidentary hearing for September 21, 1977. At that time a hearing was held, which lasted from the late morning into the evening and produced over 300 pages of testimony. On September 23, the District Court dismissed the petition and ordered that the stay of execution previously issued by it terminate at noon on September 30. But the District Court also granted applicant a certificate of probable cause to appeal, and the Court of Appeals for the Fifth Circuit then stayed applicant's execution pending its decision of his appeal.

On August 21, 1978, a panel of the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. *Spenkelink* v. *Wainwright,* 578 F. 2d 582. In an opinion comprising 39 pages in the Federal Reporter, the Court of Appeals for the Fifth Circuit dealt at length with all of applicant's claims, which had previously been rejected by the United States District Court and by the Supreme Court of Florida. It affirmed the judgment of the District Court, and we again denied certiorari on March 26, 1979, with MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissenting on the basis of their views set forth in *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976). 440 U. S. 976.

According to the application now before me, the Governor of Florida again denied executive clemency on Friday, May 18, 1979, and signed a death warrant authorizing the execution of

applicant on Wednesday, May 23, 1979, at 7 a. m., e. d. t. On Monday, May 21, applicant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida requesting the court to stay his execution pending consideration and final determination of the petition. According to the applicant, the only point he seeks to preserve in his application to me for a stay is that under this Court's decision in *Presnell* v. *Georgia,* 439 U. S. 14 (1978), "the failure to accord petitioner adequate advance notice of the aggravating circumstances alleged by the prosecution as the basis for seeking the death penalty" denied applicant rights secured to him by the Eighth and Fourteenth Amendments to the Constitution of the United States. In *Presnell, supra,* this Court held that the "fundamental principles of procedural fairness" enunciated in *Cole* v. *Arkansas,* 333 U. S. 196 (1948), "apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." 439 U. S., at 16. *Cole,* in turn, had held that "[t]o conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." 333 U. S., at 202.

This claim was submitted to and denied by the District Court for the Northern District of Florida on Monday, May 21, 1979. The District Court simultaneously entered a second order refusing certification of the appeal under both local and statutory rules, and denying a stay of execution pending appeal. Today, a panel of the Court of Appeals for the Fifth Circuit has, by a divided vote, denied applicant a certificate of probable cause, a certificate for leave to appeal *in forma pauperis,* and his motion for a stay of execution.*

*In light of the extensive scrutiny applicant's claims have received in the courts below, I decline to take the extraordinary step of granting a certificate of probable cause authorizing an appeal to the United States Court of Appeals for the Fifth Circuit from the District Court's judgment.

Throughout these many hearings, appeals, and applications, there has been virtually no dispute that substantial evidence supported the jury's verdict that applicant was guilty of first-degree murder, or that the Florida state trial judge had ample basis for following the jury's recommendation that the death penalty be imposed. The Supreme Court of Florida in its opinion affirming applicant's conviction stated:

> "As more fully set out above the record shows this crime to be premeditated, especially cruel, atrocious, and heinous and in connection with robbery of the victim to secure return of money claimed by Appellant. The aggravating circumstances justify imposition of the death sentence. Both Appellant and his victim were career criminals and Appellant showed no mitigating factors to require a more lenient sentence." 313 So. 2d, at 671.

The Court of Appeals for the Fifth Circuit, in affirming the denial of federal habeas relief, said:

> "On February 4, 1973, petitioner John A. Spenkelink, a 24-year-old white male and twice convicted felon, who had escaped from a California correctional camp, murdered his traveling companion, Joseph J. Szymankiewicz, a white male, in their Tallahassee, Florida motel room. Spenkelink shot Szymankiewicz, who was asleep in bed, once in the head just behind the left ear and a second time in the back, which fragmented the spine, ruptured the aorta, and resulted in the victim's death. [Spenkelink] then recounted a cover story to the motel proprietor in order to delay discovery of the body and left." 578 F. 2d, at 586.

When I granted an application for stay of execution as Circuit Justice in *Evans* v. *Bennett*, 440 U. S. 1301 (1979), I referred to the oft-repeated rule that a Circuit Justice must act as surrogate for the entire Court when acting on a stay application. Even though he would deny the application if

he were to consider only his own views as to its merits, he is obligated to consider the views that each Member of the Court may have as to its merits, and if he believes that four Members of the Court would vote to grant certiorari to review the applicant's claims, he is obligated to grant the application, provided it meets the other requirements for a stay. In *Evans, supra,* although I would not have voted to grant certiorari to consider applicant's claims, I was satisfied that there was a reasonable probability that four other Members of the Court would have voted differently. I therefore granted the application pending referral to the next scheduled Conference of the full Court.

In this case, by contrast, I have consulted all of my colleagues who are available, and am confident that four of them would not vote to grant certiorari to hear any of the numerous constitutional claims previously presented by applicant in his three earlier petitions for certiorari to this Court. It devolves upon me, however, as a single Justice, to answer as best I can whether four Members of the Court would grant certiorari to consider applicant's new claim that his death sentence was imposed in violation of our opinion in *Presnell* v. *Georgia.* The easiest way to find out, of course, would be to have the necessary copies of applicant's papers circulated to all eight of my colleagues in order to obtain their firsthand assessment of this contention at the next regularly scheduled Conference of the Court on Thursday. Even if I were only marginally convinced that there were four Justices who might vote to grant certiorari in order to hear this claim presented, in view of the fact that applicant's life is at stake, I would probably follow that course. But evaluating applicant's "new" claim as best I can, it does not impart to me even that degree of conviction. As I understand it, he contends that *Presnell,* which required that a state appellate court affirm a capital sentence on the same theory under which it had been imposed by the trial court, be extended to require

that the defendant receive some sort of formal notice, perhaps in the form of a specification in the indictment or information, of each and every one of the statutorily prescribed aggravating circumstances upon which the prosecution intends to rely for the imposition of the death penalty. I do not believe that four Members of this Court would find that claim either factually or legally sufficient to persuade them to vote to grant certiorari in order to review its denial in the federal habeas proceeding.

Applicant has conceded in his memorandum of law in support of the present federal habeas action that "defense counsel could properly have been expected to know that the State might seek a death sentence on the grounds that the offense was (1) committed by a defendant previously convicted of a felony involving the use or threat of violence or (2) committed by a defendant under sentence of imprisonment." Application, Exhibit B, p. 10. But the memorandum goes on to state that "a homicide caused by a single gun shot wound to the heart is not self-evidently 'especially heinous, atrocious, or cruel.' And it was not until the sentencing hearing itself that petitioner was appraised that the State would seek the death penalty on this ground." *Id.*, at 11.

Cole v. *Arkansas*, which *Presnell* simply extended to the sentencing phase of a capital trial, was after all decided in 1948, and was not then thought to embody any novel principle of constitutional law. Applicant concedes that there was adequate notice at the sentencing stage of the hearing for the State to seek the death penalty on two of the statutorily defined aggravating circumstances, and the fact that it has required six years for him to discover that he did not have adequate notice as to the other grounds upon which it was sought, and was thereby prejudiced, tends to detract from the substantiality of his contention.

Applicant has had not merely one day in court. He has had many, many days in court. It has been the conclusion of

the Supreme Court of Florida that the death sentence was imposed in accordance with the requirements of Florida law as well as those of the United States Constitution, and it has been the conclusion of the United States District Court for the Northern District of Florida and the Court of Appeals for the Fifth Circuit that there was no federal constitutional error in the process by which applicant was sentenced to death. Three times this Court has refused to review the determinations of these state and federal courts. I do not believe that the claim presented in the present application would be any more successful than the claims presented in the preceding three petitions for certiorari. The application for stay of execution of John A. Spenkelink, presently scheduled for Wednesday, May 23, 1979, at 7 a. m., e. d. t., is accordingly

Denied.

SPENKELINK *v.* WAINWRIGHT ET AL.

ON REAPPLICATION FOR STAY OF EXECUTION

No. A–1016. Decided May 23, 1979

A reapplication for stay of execution of a death sentence under a Florida murder conviction, following the denial of earlier applications, see *ante*, p. 1301, is granted until further action by the entire Court.

MR. JUSTICE MARSHALL.

John A. Spenkelink, who is scheduled to be put to death at 7:00 a. m. on May 23, 1979, has applied to me for a stay of his execution. MR. JUSTICE REHNQUIST and MR. JUSTICE STEVENS have both denied the application, and the pertinent facts are set forth in MR. JUSTICE REHNQUIST's opinion, *ante*, p. 1301. Given the Court of Appeals' divided vote on whether to grant a certificate of probable cause, the irrevocable nature of the penalty to be imposed, and the ability of the full Court to consider this case within 36 hours at our regular Conference, I believe it appropriate to grant the application for a stay until further action by the entire Court.

Granted.

WILLIAMS *v.* ZBARAZ

ON APPLICATION FOR STAY

No. A–958. Decided May 24, 1979*

Applications for a stay, pending appeal to this Court, of the District Court's order enjoining the State of Illinois from refusing to fund under its medical assistance programs "medically necessary" abortions performed prior to viability of the fetus are denied. The District Court, in an action where the plaintiffs are a class of certain pregnant women and a class of certain physicians, held that an Illinois statute under which only "life-preserving" abortions were funded was unconstitutional on equal protection grounds. The applications do not present the "extraordinary circumstances" necessary to justify a stay. A stay is not necessary to preserve the issue for decision by this Court; and in light of the competing equities, applicants, the Director of the Illinois Department of Public Aid and physicians who intervened as defendants below, have failed to sustain their burden of demonstrating that the risk of irreparable harm to them if the injunction remains in effect outweighs the risk of irreparable harm to plaintiffs if a stay of that injunction is granted.

MR. JUSTICE STEVENS, Circuit Justice.

Applicants seek a stay of an order of the United States District Court for the Northern District of Illinois enjoining the State of Illinois from refusing to fund under its medical assistance programs medically necessary abortions performed prior to viability.

The plaintiffs in this action are a class of pregnant women eligible for Illinois medical assistance programs for whom an abortion is medically necessary and a class of physicians who perform such procedures and are certified to receive reimbursement for necessary medical services. Their complaint alleged that the Illinois statute, 1977 Ill. Laws, Pub. Act 80–1091, § 1, denying reimbursement for medically necessary abortions vio-

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*Together with No. A–967, *Quern* v. *Zbaraz*, also on application for stay of the same order.

lated their rights under both the Social Security Act and the Fourteenth Amendment. After the United States Court of Appeals for the Seventh Circuit reversed the District Court's initial decision to abstain, 572 F. 2d 582, the District Judge held that the Illinois statute violated the federal Social Security Act and its implementing regulations, since Illinois' funding of only "life-preserving" abortions fell short of the federal statutory responsibility to "establish reasonable standards" for providing medically necessary treatment. The court rejected the argument that the Hyde Amendment's [1] prohibition of federal funding of certain categories of abortions limited the State's statutory responsibility, and entered an injunction requiring Illinois to fund medically necessary abortions. The Court of Appeals, after denying a stay of the injunction pending appeal, reversed the District Court decision. The Court of Appeals concluded that the Hyde Amendment was not simply a limitation on the use of federal funds for abortions, but was itself a substantive amendment to the obligations imposed upon the State by Title XIX of the Social Security Act, 42 U. S. C. § 1396 *et seq.* The court recognized the constitutional questions raised by its interpretation and remanded to the District Court with instructions to consider the constitutionality of both the Illinois statute and the Hyde Amendment.

The District Court held both provisions to be unconstitutional on equal protection grounds. While rejecting the argument that strict scrutiny was appropriate, Judge Grady

[1] Public Law 95–480, § 210, 92 Stat. 1586, commonly known as the Hyde Amendment, provides:

"None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

concluded that the statute's distinction between indigent women in medical need of abortions and those in need of other surgical procedures failed to further any legitimate, articulated state purpose. He was not persuaded by the State's argument that its interest in "fiscal frugality" supported the classification, since the costs of prenatal care, childbirth, and postpartum care were established to be substantially higher than the cost of abortions. As to the State's asserted interest in the encouragement of childbirth, the court recognized that while this interest was clearly legitimate in certain circumstances, see *Maher* v. *Roe,* 432 U. S. 464; *Poelker* v. *Doe,* 432 U. S. 519, the State does not have a legitimate interest in promoting the life of a nonviable fetus in a woman for whom an abortion is medically necessary. The United States had intervened as a defendant on remand, when the constitutionality of the Hyde Amendment was called into question. The District Court's injunction, however, was directed solely to the State of Illinois, which was ordered to fund medically necessary abortions prior to viability. The District Court refused to stay this order, and applicants—the Director of the Illinois Department of Public Aid and two physicians who intervened as defendants below—now seek a stay from me in my capacity as Circuit Justice, pending their appeal to this Court.

The standards governing the issuance of stays are well established. "Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity." *Graves* v. *Barnes,* 405 U. S. 1201, 1203 (POWELL, J., in chambers). "To prevail here the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Whalen* v. *Roe,* 423 U. S. 1313, 1316 (MARSHALL, J., in chambers). In my view, the applica-

tions before me do not present the "extraordinary circumstances" necessary to justify a stay.

An initial inquiry where a stay is sought in a case within this Court's appellate jurisdiction is "whether five Justices are likely to conclude that the case was erroneously decided below." *Graves* v. *Barnes, supra,* at 1203. Applicants' claim that the District Court improperly distinguished our prior decisions in *Maher* and *Poelker* is far from frivolous, and may well prevail in this Court. While the District Court's judgment is entitled to a presumption of validity, so are statutes validly enacted by Congress and the State of Illinois. Even so, a stay is not necessary to preserve the issue for decision by the Court: the controversy between plaintiffs and defendants is a live and continuing one, and there is simply no possibility that, absent a stay, our appellate jurisdiction will be defeated. Cf. *In re Bart,* 82 S. Ct. 675, 7 L. Ed. 2d 767 (Warren, C. J., in chambers). The question, then, is only whether the District Court's injunction should be observed in the interim. Unless the applicants will suffer irreparable injury, it clearly should be. See *Whalen* v. *Roe, supra,* at 1317–1318.

In addressing the irreparable-injury issue, the task of a judge or Justice is to examine the "competing equities," *Socialist Labor Party* v. *Rhodes,* 89 S. Ct. 3, 21 L. Ed. 2d 72 (STEWART, J., in chambers), a task that involves "balancing th[e] injury [to one side] against the losses that might be suffered by [the other]." *Railway Express Agency* v. *United States,* 82 S. Ct. 466, 468, 7 L. Ed. 2d 432, 434 (Harlan, J., in chambers). Where the lower court has already performed this task in ruling on a stay application, its decision is entitled to weight and should not lightly be disturbed. *Graves* v. *Barnes, supra; Railway Express Agency* v. *United States, supra.*

Both sides agree as to the consequences of a stay of the District Court's order in this case: if a stay is not granted, indigent women for whom an abortion is medically necessary will

be able to have abortions prior to viability; with a stay, many or most of them will not. In support of their argument that the former course will cause irreparable injury, applicants point to two factors. First is the State's financial integrity, and the losses which Illinois will suffer if forced to fund medically necessary abortions pending appeal, particularly since no federal reimbursement for these expenses has been ordered. I find this argument unpersuasive. Both the findings of the District Court and the record before me compellingly demonstate that it is less expensive for the State to pay the entire cost of abortion than it is for it to pay only its share of the costs associated with a full-term pregnancy. Far from suffering any irreparable financial losses without a stay, the State will benefit financially if one is not granted.

The second state interest asserted merits greater concern. A refusal to stay the District Court's order, it is argued, will result in irreparable injury to the interest of the people of Illinois in protecting potential human life. We have in the past recognized the legitimacy of the state interest in encouraging childbirth, and I do not doubt its validity here. How much weight can properly be accorded to that interest, however, is a somewhat different question; *Roe* v. *Wade,* 410 U. S. 113, itself establishes that the State's interest in potential life is never so great that it can outweigh the woman's interest in her health or in deciding, prior to viability, whether to have an abortion. Moreover, the State clearly has an interest in preserving and protecting the life and health of the mother, as well as in promoting childbirth. In this case, where we deal only with "medically necessary" abortions, the weight to be accorded to the State's interest in childbirth must necessarily be diminished by its acknowledged interest in the health of the mother. Finally, the State's policy of encouraging childbirth is in no way guaranteed if a stay is granted. Even without state assistance, at least some indigent women will secure abortions: they may "beg, borrow, or steal" the money; they

may find doctors willing to treat them without charge; or they may resort to less costly and less safe illegal methods. While the refusal of a stay will in many cases defeat the State's ability to enforce its interest in promoting childbearing, the grant of a stay will not ensure the full effectuation of that interest.

These claims of irreparable injury to the interests of the State must be weighed against the plaintiffs' claims of irreparable injury to their interests if a stay is granted. First, the women plaintiffs here have a conceded constitutional right to choose to have an abortion. Whether or not the State is under a constitutional obligation to fund their abortions, the fact remains that meaningful exercise of this constitutional right depends on the actual availability of abortions. Under the District Court's judgment, the women will in fact be free to decide whether or not to have an abortion; if the judgment is stayed, the constitutional right to choose will for many be meaningless. And in these circumstances, the loss to the women may be particularly grievous. The order here is addressed only to abortions which are "medically necessary" for the health of the mother. The District Court found that if medically necessary abortions are not performed, "the mother may be subjected to considerable risk of severe medical problems, which may even result in her death."

> "Under the Hyde Amendment standard, a doctor may not certify a woman as being eligible for a publicly funded abortion except where 'the life of the mother would be endangered . . . or . . . where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . .' Most health problems associated with pregnancy would not be covered by this language . . . and those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother . . . . At the earlier stages of pregnancy, and even at the later

> stages, doctors are usually unable to determine the degree of injury which may result from a particular medical condition . . . . The effect of the new criteria, then, will be to increase substantially maternal morbidity and mortality among indigent pregnant women." Memorandum opinion, No. 77C 4522 (ND Ill. Apr. 27, 1979), pp. 10–11.

Whether or not these findings provide support for the District Court's judgment on the merits, a distinct question which I do not consider here, it is clear that they do provide support for plaintiffs' claims of irreparable injury if a stay is granted.

Balancing these same equities of the plaintiffs and defendants, the District Court denied a stay of its injunction pending appeal. The applicants had also sought a stay from the Seventh Circuit, pending appeal, of the District Court's earlier order requiring the State to fund medically necessary abortions on the grounds that its refusal to do so violated the Social Security Act. That application was denied by Judges Fairchild, Bauer, and Wood, who concluded that "the defendant-appellant and intervening defendants-appellants have not sustained their heavy burden of demonstrating immediate irreparable harm in the absence of a stay of the district court's injunction pending appeal." Plaintiffs' Exhibit K–2.[2] Both of these courts, evaluating the same or substantially the same claims as those made here, concluded that a stay was not warranted. Their decisions must be given some weight. I am persuaded that they are correct.

Whether or not the plaintiffs prevail in this Court, the fact is that they did in the District Court. The burden is on the defendants-applicants to establish that the order of the District Court should not be enforced. Balancing the equities is always a difficult task, and few cases are ever free from doubt.

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[2] A stay was then sought in this Court, and both THE CHIEF JUSTICE and I denied the application. I have reviewed the claims of the parties anew in connection with these applications. And I have concluded once again that the judgment of the lower court should not be disturbed.

Where there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents. Cf. *Enomoto* v. *Spain*, 424 U. S. 951 (STEVENS, J., dissenting). In my judgment, as in the judgment of the District Court and the Court of Appeals, the equities here appear to favor the plaintiffs. The applications for a stay are therefore denied.

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INTERROGATION BY POLICE. See **Constitutional Law**, VI, 2; VII.

INTERSTATE COMMERCE ACT. See **Interstate Commerce Commission.**

INTERSTATE COMMERCE COMMISSION.

Shipping rates—Decision not to investigate—Reviewability.—Commission's order denying shippers' request that Commission exercise its authority under § 15 (8) (a) of Interstate Commerce Act to suspend railroads' proposed seasonal increase in certain shipping rates, but admonishing railroads to correct any existing violations and directing that records be kept to protect shippers' right to recover damages if they subsequently brought actions under § 13 (1) of Act, was not a final decision that proposed tariff was lawful, but rather was a discretionary decision not to then investigate its lawfulness and was not subject to judicial review. Southern R. Co. v. Seaboard Allied Milling Corp., p. 444.

INTERSTATE GAS SERVICE. See **Natural Gas Act.**

IOWA. See **Indians.**

JUDGMENTS. See **Bankruptcy Act; Procedure,** 2; **Sentences.**

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NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.

Appropriation requests—Necessity of environmental impact statements.—Section 102 (2)(C) of Act does not require federal agencies to

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969—Continued.
prepare environmental impact statements to accompany appropriation requests. Andrus v. Sierra Club, p. 347.

NATIONAL LABOR RELATIONS ACT. See **National Labor Relations Board.**

NATIONAL LABOR RELATIONS BOARD.

Orders—Hospital's no-solicitation rule.—Court of Appeals correctly concluded that Board lacked substantial evidence to support its order forbidding a hospital to apply its rule prohibiting union solicitation by employees in corridors and sitting rooms on floors having patients' rooms or operating and therapy rooms, but evidence supported Board's conclusion that hospital had not justified prohibition of union solicitation in cafeteria, gift shop, and lobbies on hospital's first floor. NLRB v. Baptist Hospital, Inc., p. 773.

NATIONAL WILDLIFE REFUGE SYSTEM. See **National Environmental Policy Act of 1969.**

NATIONWIDE CLASS ACTIONS. See **Social Security Act,** 2.

NATURAL GAS ACT.

Abandonment of interstate service—Authorization.—Section 7 (b) of Act requires producers to continue supplying in interstate commerce all gas produced from a dedicated leasehold until they obtain authorization for abandonment of service from Federal Energy Regulatory Commission (previously Federal Power Commission), and Commission did not abuse its discretion in refusing to approve abandonment retroactively and disregard evidence of subsequent production where lessee-producer, upon notifying interstate purchaser that existing wells were depleted, had not sought Commission's abandonment authorization and subsequently discovered new gas reserves were attempted to be sold to intrastate purchaser. United Gas Pipe Line Co. v. McCombs, p. 529.

NEBRASKA. See **Constitutional Law,** III, 5; **Indians.**

NEUTRAL AND DETACHED JUDICIAL OFFICER. See **Constitutional Law,** VI, 1.

NEUTRAL FACTFINDERS. See **Constitutional Law,** III, 7, 8.

NEW DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

NEW YORK. See **Constitutional Law,** III, 6; VI, 1, 2.

NORTH CAROLINA. See **Rehabilitation Act of 1973.**

NO-SOLICITATION RULES. See **National Labor Relations Board.**

NOTICE OF OFFENSE. See **Constitutional Law,** III, 4.

NURSING SCHOOL ADMISSION REQUIREMENTS. See **Rehabilitation Act of 1973.**

OBSCENITY. See **Constitutional Law,** VI, 1.

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OLD-AGE BENEFITS. See **Social Security Act.**

OMAHA INDIAN TRIBE. See **Indians.**

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968. See also **Constitutional Law,** III, 4; IV, 3; VIII.

Unlawful receipt of firearm—Maximum sentence.—A person who is convicted of violating a provision of Act, 18 U. S. C. § 922 (h), prohibiting previously convicted felons from receiving a firearm that has traveled in interstate commerce is properly sentenced to maximum 5-year term authorized by § 924 (a) even though his conduct also violates substantive elements of another provision of Act, 18 U. S. C. App. § 1202 (a), which authorizes a maximum sentence of only two years' imprisonment. United States v. Batchelder, p. 114.

ORGANIZATIONAL RIGHTS OF EMPLOYEES. See **National Labor Relations Board.**

ORGANIZED CRIME CONTROL ACT OF 1970. See also **Constitutional Law,** III, 1.

False statements—Proceeding ancillary to a court or grand jury.—An interview in a private attorney's office at which a sworn statement is given does not constitute a proceeding "ancillary to any court or grand jury" within meaning of Title IV of Act, which prohibits false declarations made under oath in such ancillary proceedings. Dunn v. United States, p. 100.

OVERPAYMENT OF WELFARE BENEFITS. See **Social Security Act.**

PARENT AND CHILD. See **Abstention,** 1; **Constitutional Law,** III, 7, 8.

PAROLE. See **Constitutional Law,** III, 5; **Sentences.**

PENNSYLVANIA. See **Constitutional Law,** III, 8.

PEN-REGISTER SURVEILLANCE OF TELEPHONES. See **Constitutional Law,** VI, 5.

PHYSICAL QUALIFICATIONS FOR ADMISSION TO NURSING SCHOOL. See **Rehabilitation Act of 1373.**

POLICE INTERROGATIONS. See **Constitutional Law,** VI, 2; VII.

POLITICAL PARTIES. See **Constitutional Law, V, 1.**

POSSESSION OF FIREARMS. See **Constitutional Law, III, 6.**

POSSESSION OF MARIHUANA. See **Constitutional Law, VI, 4.**

PREMARKETING APPROVAL OF NEW DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

PRESUMPTIONS. See **Constitutional Law, III, 2, 6; Indians, 2.**

PRICE FIXING. See **Antitrust Acts.**

PRISONERS' RIGHTS AS TO PAROLE. See **Constitutional Law, III, 5.**

PRIVACY. See **Constitutional Law, VI, 1, 2, 4, 5.**

PRIVATE ANTITRUST SUITS. See **Antitrust Acts.**

PRIVATE CAUSES OF ACTION. See **Securities Exchange Act of 1934.**

PRIVATE IMMIGRATION BILLS. See **Constitutional Law, IX.**

PRIVILEGES AND IMMUNITIES. See **Civil Rights Act of 1964.**

PROBABLE CAUSE FOR ARREST. See **Constitutional Law, V, 2.**

PROBABLE CAUSE FOR SEARCH. See **Constitutional Law, VI, 1, 3.**

PROBATION OFFICERS. See **Constitutional Law, VII.**

PROCEDURAL DUE PROCESS. See **Constitutional Law, III, 1, 5.**

PROCEDURE. See also **Abstention; Constitutional Law, III, 1, 5.**

1. *Denial of motion to dismiss indictment—Mandamus or appeal as appropriate remedy.*—Upon a District Court's denial of a motion to dismiss an indictment of petitioner, then a Member of Congress, for conspiring to solicit and accept, and for soliciting and accepting, bribes in return for being influenced in the performance of official acts—petitioner contending that the indictment violated the Speech or Debate Clause because the grand jury had heard evidence of legislative acts—mandamus from the Court of Appeals was not the appropriate means of challenging the indictment's validity, direct appeal to that court being the proper course. Helstoski v. Meanor, p. 500.

2. *Moot appeal—Dismissal of lower court's judgment.*—Upon dismissing as moot an appeal from District Court's order requiring arbitration of a dispute as to respondent's discharge by petitioner (arbitration having been completed before appeal could be decided), Court of Appeals erred in holding that District Court's judgment should remain in effect but, instead, should have set aside the District Court's judgment and remanded cause with directions to dismiss. Great Western Sugar Co. v. Nelson, p. 92.

PROCEEDING ANCILLARY TO A COURT OR GRAND JURY. See **Constitutional Law**, III, 1; **Organized Crime Control Act of 1970.**

PROPERTY RIGHTS. See **Indians.**

PROSECUTING ATTORNEYS. See **Constitutional Law**, III, 4; IV, 3.

PUERTO RICO. See **Constitutional Law**, VI, 3.

PUNISHMENT. See **Constitutional Law**, III, 3, 4; IV, 3; VIII; **Omnibus Crime Control and Safe Streets Act of 1968; Sentences; Stays**, 2, 3.

PUNITIVE DAMAGES. See **Railway Labor Act.**

QUIET-TITLE ACTIONS. See **Indians.**

RAILROAD TARIFFS. See **Interstate Commerce Commission.**

RAILWAY LABOR ACT.

Unfair representation action against union—Right to punitive damages.—Act does not permit an employee to recover punitive damages for a union's breach of its duty of fair representation in processing employee's grievance against his employer for wrongful discharge. Electrical Workers v. Foust, p. 42.

REASONABLE EXPECTATION OF PRIVACY. See **Constitutional Law**, VI, 5.

REASONABLE SUSPICION AS GROUND FOR SEIZURE. See **Constitutional Law**, VI, 2.

RECEIPT OF FIREARMS. See **Constitutional Law**, III, 4; IV, 3; VIII; **Omnibus Crime Control and Safe Streets Act of 1968.**

RECOUPMENT. See **Social Security Act.**

REHABILITATION ACT OF 1973.

Admission to nursing school—Hearing disability.—Section 504 of Act was not violated when state college denied respondent admission to its nursing program because of her hearing disability, nothing in Act limiting educational institution's freedom to impose reasonable physical qualifications for admission to a clinical training program or requiring institution to lower or substantially modify standards to accommodate a handicapped person. Southeastern Community College v. Davis, p. 397.

RELEASE ON PAROLE. See **Constitutional Law**, III, 5.

RESERVATION LANDS. See **Indians**, 1.

RES JUDICATA. See **Bankruptcy Act.**

RESTRAINING STATE PROCEEDINGS. See **Abstention**, 1.

REVOCATION OF PAROLE. See **Constitutional Law**, III, 5.

RIGHT TO COUNSEL. See **Constitutional Law**, VII.

RIGHT TO FAIR TRIAL. See **Constitutional Law**, III, 3.

RIGHT TO REMAIN SILENT. See **Constitutional Law**, VII.

RIPARIAN RIGHTS. See **Indians**, 1.

RULES OF CIVIL PROCEDURE. See **Social Security Act**, 2.

SAFETY OF DRUGS. See **Federal Food, Drug, and Cosmetic Act.**

SEARCHES AND SEIZURES. See **Constitutional Law**, VI.

SEARCH WARRANTS. See **Constitutional Law**, VI, 1, 4, 5.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Federal Food, Drug, and Cosmetic Act.**

SECURITIES AND EXCHANGE COMMISSION. See **Securities Exchange Act of 1934.**

SECURITIES EXCHANGE ACT OF 1934.

Financial reports of broker-dealer—Improper audit—Accounting firm's liability.—There is no implied private cause of action for damages under § 17 (a) of Act, which requires broker-dealers to keep such records and file such reports as the Securities and Exchange Commission may prescribe, and thus accounting firm that audited brokerage firm's books and prepared annual financial reports for filing with Commission could not be held liable under § 17 (a) for allegedly improper audit. Touche Ross & Co. v. Redington, p. 560.

SECURITIES INVESTOR PROTECTION ACT. See **Securities Exchange Act of 1934.**

SELECTIVITY IN ENFORCEMENT OF CRIMINAL LAWS. See **Constitutional Law**, III, 4; IV, 3.

SELF-INCRIMINATION. See **Constitutional Law**, VI, 2; VII.

SENTENCES. See also **Constitutional Law**, III, 3, 4; IV, 3; VIII; **Omnibus Crime Control and Safe Streets Act of 1968**; **Stays**, 2, 3.

Collateral attack—Change in parole policies.—A federal prisoner's allegation that a postsentencing change in policies of United States Parole Commission—giving consideration to seriousness of offense as a significant factor in determining whether a prisoner should be granted parole—has prolonged his actual imprisonment beyond period intended by sentencing judge will not support a collateral attack on original sentence under 28 U. S. C. § 2255. United States v. Addonizio, p. 178.

SEPARATION OF POWERS. See **Constitutional Law**, VIII.

SEX DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law**, IV, 1, 2.

SHIPPING RATES FOR GRAINS AND SOYBEANS. See **Interstate Commerce Commission.**

SIXTH AMENDMENT. See **Constitutional Law**, II.

SOCIAL SECURITY ACT.

1. *Old-age, survivors', or disability benefits—Recoupment of overpayments.*—Recipients of old-age, survivors', or disability benefits who file a written request under § 204 (b) of Act for Government's waiver of recoupment of erroneous overpayments are entitled to an opportunity for a prerecoupment oral hearing, but neither § 204 nor standards of Due Process Clause require prerecoupment oral hearings as to requests under § 204 (a) for reconsideration as to whether overpayment occurred. Califano v. Yamasaki, p. 682.

2. *Validity of administrative procedures—Class action—Nationwide class.*—Where a district court has jurisdiction over claims of members of plaintiff class in accordance with requirements of § 205 (g) of Act, it also has discretion under Fed. Rule Civ. Proc. 23 to certify a class action for litigation of those claims, and there was no abuse of discretion in certifying a nationwide class in an action challenging validity of administrative procedures pertaining to Government's recoupment of erroneous overpayments of old-age, survivors', or disability benefits and to Government's reconsideration or waiver of recoupment. Califano v. Yamasaki, p. 682.

SOLICITATION OF EMPLOYEES BY LABOR UNIONS. See **National Labor Relations Board.**

SOLICITING BRIBES. See **Procedure**, 1.

SPEECH OR DEBATE CLAUSE. See **Constitutional Law**, IV, 1; IX; **Procedure**, 1.

STANDING TO SUE. See **Antitrust Acts; Constitutional Law**, IV, 1.

STATE BOUNDARIES. See **Indians**, 1.

STATE CIVIL SERVICE. See **Constitutional Law**, IV, 2.

STATE COMMITTEE OF POLITICAL PARTY. See **Constitutional Law**, V, 1.

STATE-COURT JUDGMENT AS BINDING ON BANKRUPTCY COURT. See **Bankruptcy Act.**

STATE MENTAL INSTITUTIONS. See **Constitutional Law**, III, 7, 8.

STAYS.

1. *Injunction—State funding of abortions.*—Applications to stay District Court's order enjoining State of Illinois from refusing to fund under its medical assistance programs "medically necessary" abortions performed prior to viability of fetus are denied. Williams v. Zbaraz (STEVENS, J., in chambers), p. 1309.

2. *Murder conviction—Death penalty.*—Application for stay of execution of a death sentence under a Florida murder conviction is denied. Spenkelink v. Wainwright (REHNQUIST, J., in chambers), p. 1301.

3. *Murder conviction—Death penalty.*—Reapplication for stay of execution of a death sentence under a Florida murder conviction is granted. Spenkelink v. Wainwright (MARSHALL, J., in chambers), p. 1308.

"STOP AND FRISK." See **Constitutional Law**, VI, 2.

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UNIVERSITIES. See **Rehabilitation Act of 1973.**

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VALIDITY OF INDICTMENTS. See **Procedure,** 1.

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VOLUNTARINESS OF CONSENT TO SEARCH. See **Constitutional Law,** VI, 1.

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1. *"Indian."* 25 U. S. C. § 194. Wilson v. Omaha Indian Tribe, p. 653.

2. *"Injured in his business or property."* § 4, Clayton Act, 15 U. S. C. § 15. Reiter v. Sonotone Corp., p. 330.

3. *"New Drug."* §§ 201 (p) (1), 505, Federal Food, Drug, and Cosmetic Act, 21 U. S. C. §§ 321 (p) (1), 355. United States v. Rutherford, p. 544.

4. *"Otherwise qualified handicapped individual."* § 504, Rehabilitation Act of 1973, 29 U. S. C. § 794 (1976 ed., Supp. II). Southeastern Community College v. Davis, p. 397.

5. *"Proceeding before or ancillary to any court or grand jury."* Title IV, Organized Crime Control Act of 1970, 18 U. S. C. § 1623. Dunn v. United States, p. 100.

6. *"Proposals for legislation."* § 102 (2) (C), National Environmental Policy Act of 1969, 42 U. S. C. § 4332 (2) (C). Andrus v. Sierra Club, p. 347.

WORDS AND PHRASES—Continued.

7. *"Proposals for . . . major Federal actions."* § 102 (2)(C), National Environmental Policy Act of 1969, 42 U. S. C. § 4332 (2)(C). Andrus v. Sierra Club, p. 347.

8. *"Speech or Debate."* U. S. Const., Art. I, § 6. United States v. Helstoski, p. 477.

9. *"White person."* 25 U. S. C. § 194. Wilson v. Omaha Indian Tribe, p. 653.

WRONGFUL DISCHARGES OF EMPLOYEES. See **Constitutional Law**, IV, 1; **Procedure**, 2; **Railway Labor Act.**

U.S. GOVERNMENT PRINTING OFFICE : 1981 O - 297-181 : QL 3